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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

By JOHN L. GRIFFITHS,
OFFICIAL REPORTER.

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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. SILAS D. COFFEY. *†

HON. BYRON K. ELLIOTT. **†

HON. ROBERT W. McBRIDE. §

HON. JOHN D. MILLER. ||

HON. WALTER OLDS. †

* Chief Justice at the May Term, 1891.

† Term of office commenced January 7th, 1889.

** Chief Justice at the November Term, 1891.

‡ Term of office commenced January 3d, 1887.

§ Appointed December 17th, 1890, to succeed Hon. Joseph A. S. Mitchell.

|| Appointed February 25th, 1891, to succeed Hon. John G. Berkshire.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
ANDREW M. SWEENEY.

SHERIFF,
JAMES L. YATER.

LIBRARIAN,
WILLIAM W. THORNTON.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1891, IN THE SEVENTY-FIFTH
YEAR OF THE STATE.

No. 16,048.

BELL v. THE STATE, EX REL. SUMMERS.

COUNTY COMMISSIONERS.—*Term of Office.*—The act of March 7, 1885 (Acts 1885, p. 69), regulating the term of office of county commissioners, was not intended to change the order of succession, nor to lengthen the terms of county commissioners.

SAME.—*Duration of Term.*—An act approved February 17, 1838, required each county in the State, except those named in the act, to elect three commissioners for the county at the ensuing election, the person receiving the highest number of votes to serve for the term of three years, the person receiving the next highest two years, and the person receiving the next highest one year. The commissioners elected under the terms of this act organized September 3, 1838. The term of the commissioner from the second district, he having received the least number of votes, expired in one year. The regular succession was kept up until 1869. By reason of changing the elections from an annual to a biennial period, the successor of the commissioner from the second district was not elected until the second Tuesday of October, 1870. He held until 1873, and the three-year terms from this district have since been reckoned as beginning with the year 1870, instead of the year 1869. The act of March 1, 1885, provides that the term of office of county commissioners shall be three years, and shall begin on the first Monday in De-

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cember, and the term of office of no two districts in the same county shall begin in the same year; and the year in which the term of office in each district shall begin shall be determined by calculating periods of three years from the end of the term for which the commissioner for the same district was elected upon the organization of the board of commissioners for the county.

Held, that the time of the commencement of the term of office of the commissioner from the second district is to be determined by counting periods of three years from the year 1839, when the term of the first commissioner from the second district expired; and that the term held by the previous commissioner from 1869 to 1870 was simply an encroachment on the term of his successor, and did not change the term of office.

From the Huntington Circuit Court.

J. B. Kenner, for appellant.

L. P. Milligan, O. Whitelock and S. E. Cook, for appellee.

COFFEY, C. J.—This action was brought in the Huntington Circuit Court, by the appellee against the appellant, to test the right of the latter to hold the office of county commissioner from the second district in said county. The court overruled a demurrer to the information in the cause, and, the appellant refusing to plead further, the appellee had judgment.

The material facts in the case, as they appear in the information are, substantially, that prior to 1834, the county of Huntington embraced the territory now included in the counties of Wabash and Whitley. While it embraced this territory a board of commissioners was organized on the 5th day of May, 1834.

In the year 1835, Wabash county was organized, and Whitley county was organized in the year 1838. On the 4th day of February, 1837, a special act of the Legislature was approved, abolishing the board of commissioners of Huntington county, and transferring all the business then pending before that body to a board consisting of the qualified justices of the peace of the county, which board of justices transacted the business of the county usually transacted by the board of commissioners, until the 17th

day of February, 1838. On that day a general act of the Legislature was approved requiring each county in the State, except those named in the act, to elect three qualified commissioners for the county at the ensuing August election. The act provided that the person receiving the highest number of votes should serve for the term of three years, the person receiving the next highest two years, and the person receiving the next highest one year. Under the terms of this act, John R. Emley, James R. Tanner and Joseph Wiley were elected as commissioners for Huntington county and organized on the 3d day of September, 1838.

Tanner was elected from the second district, and having received a less number of votes than either of the other two, his term of office expired in one year. His successor was duly elected and held for the period of three years, and the regular succession was kept up until 1869.

In the year 1866, John Brubaker was elected from the second district, but, by reason of changing the elections from an annual to a biennial period, his successor was not elected until the second Tuesday of October, 1870. Brubaker's successor held until 1873, and the three-year terms from this district have since been reckoned as beginning with the year 1870, instead of the year 1869. The appellant was elected as county commissioner from this district at the November election in the year 1884. At the November election in 1888 he was elected his own successor. At the November election in the year 1890 the relator was duly elected as county commissioner for the second district, and has qualified and made the necessary demand for his office, claiming that the appellant's term expired on the first Monday in December, 1890. The appellant claims that his term of office will not expire until the first Monday in December, 1891.

Section 1934, Elliott's Supplement, provides that the term of office of county commissioners shall be three years, and shall begin on the first Monday in December, and the term

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of office of no two districts in the same county shall begin in the same year; and the year in which the term of office of each district shall begin shall be determined by calculating periods of three years from the end of the term for which the commissioner for the same district was elected upon the organization of the board of commissioners for the county. This act was approved on the 7th day of March, 1885.

It has always been the legislative policy in this State to so organize the boards of county commissioners as that one member should retire each year. The term of office is applied to the office itself, and not to the person filling it. The act of 1885 was not intended to change the order of succession, nor to lengthen the terms of county commissioners. Except to fix the first Monday of December as the date for the commencement of the term, the act is wholly declaratory. As applied to districts where the regular succession had been observed, it did not effect any change whatever except to fix the first Monday in December as the commencement of the term. *Parcel v. State, ex rel.*, 110 Ind. 122; *State, ex rel., v. Barlow*, 103 Ind. 563; *Jones v. State, ex rel.*, 112 Ind. 193; *Parmater v. State, ex rel.*, 102 Ind. 90; *State, ex rel., v. Bell*, 116 Ind. 1.

Counting periods of three years from the year 1839, when Tanner's term expired, the appellant's term ended and the relator's term began on the first Monday in December, 1890.

The time held by Brubaker from 1869 to 1870 was simply an encroachment on the term of his successor, and did not change the term of the office.

It is contended by the appellant, however, that the periods should be counted from the year 1834, when the first board of commissioners was organized in Huntington county. It is evident that we could not adopt this mode of computation without disturbing the succession fixed by the law under which the present board of commissioners of Huntington county was organized. As we have seen, it was not

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the intention of the act of 1885 to disturb the regular successions as fixed by law, but to fix a rule by which disputes as to the succession might be settled and litigation prevented.

We think the periods should be counted from the time when Tanner's term expired.

The court did not err in overruling the demurrer to the information in this cause.

Judgment affirmed.

Filed Sept. 15, 1891.

No. 15,893.

LAUGHLIN v. HIBBEN ET AL.

MORTGAGE.—Insanity of Mortgagor.—Setting Aside Decree of Foreclosure.—

Where a valid mortgage is executed by a husband, his wife joining, a decree of foreclosure will not be set aside because when it was rendered the husband was insane, at least where the defendant was a purchaser in good faith after a judgment for possession, and where there is no tender of payment.

From the Rush Circuit Court.

J. B. Julian and *J. F. Julian*, for appellant.

J. A. New and *W. Woods*, for appellees.

ELLIOTT, J.—The appellant alleges, in her complaint, that on the 9th day of August, 1880, she joined her husband in a mortgage to secure the sum of two thousand dollars borrowed by her husband of the appellee Gertrude Hibben, guardian of an infant ward; that on the 5th day of February, 1885, the mortgagee instituted a suit to foreclose the mortgage; and that a decree of foreclosure was rendered; that at the time the foreclosure suit was instituted the appellant's husband, David J. Laughlin, was insane; that the agent of the mortgagee was informed of the insanity of David J. Laughlin,

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but represented to the appellant that it was not necessary to have a guardian appointed for him. The appellee New answered the complaint by alleging the execution of the mortgage; that suit was duly brought and process served; that the appellant appeared and answered the mortgagee's complaint, but did not plead the husband's insanity; that trial was had upon the issue tendered by her answer, and a decree rendered; that the land was sold by the sheriff and purchased by the mortgagee, on the 9th day of May, 1889; that a deed was duly issued; that the judgment debtors refused to surrender possession, and an action was subsequently brought for possession; that judgment was rendered awarding possession to the plaintiff in that action, and under the writ issued thereon the appellant and her husband were ejected; that the defendant subsequently bought the land from Gertrude Hibben and paid full value therefor, and afterwards sold and conveyed it to the appellee Rock; that the defendant was ignorant of any infirmity in the title, and was a purchaser in good faith. The cross-complaint of New, as well as the cross-complaint of Rock, sets forth substantially the same facts.

It is clear that the appellant has no cause of action. Her husband made a contract, obtained two thousand dollars, executed a mortgage to secure it, and at the time this was done he was capable of contracting. The subsequent loss of mind did not, of course, invalidate the contract. As there was a valid mortgage, the mortgagee had a right to enforce it, for the subsequent insanity of the husband of the appellant could not take from the mortgagee the right to enforce her mortgage in due course. The decision in *Woods v. Brown*, 93 Ind. 164, is directly in point, and precludes a recovery by the appellant. That decision is fully sustained by the authorities, and it goes further than we are required to do here. In this instance there was a valid mortgage supported by an adequate consideration; there was a decree in due course foreclosing the mortgage, and there was a

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judgment for possession rendered in a subsequent action based upon the title derived from the sale on the decree, so that the case is much stronger than the one to which we have referred. The old and firmly established principle that equity will not annul a judgment, unless a defence is shown, is influential here, for it does not appear that there is any defence whatever to the mortgage. For anything that appears it would be useless to vacate the decree, since, as there is no defence to the mortgage, and no tender of payment, no good would be accomplished by vacating the decree of foreclosure. It would be unjust to the mortgagee to multiply costs where there is no defence, nor any attempt to do equity. It would be still more unjust to take title from the purchasers where two judgments are adverse to the claimant upon the question of title, and the purchasers bought in good faith.

Judgment affirmed.

Filed May 26, 1891; petition for a rehearing overruled Sept. 15, 1891.

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No. 14,844.

FORDICE v. GIBSON ET AL.

SALE.—*Executory Contract.*—*Personal Property.*—*Delivery.*—*Vesting of Title.*—

A. purchased a tract of land for the purpose of cutting and utilizing the timber in the manufacture of staves. An unpaid balance of the purchase-price was secured by a mortgage on the land. A. afterwards entered into a contract with the appellees, whereby he agreed to deliver to them a large number of staves, of his first manufacture of merchantable sawed staves. The contract further provided that the title and ownership of all the timber and staves bought by A. should vest in the appellees until the contract was complied with. The appellees were to furnish A. a sufficient amount of money from time to time to pay for making and hauling the staves. The appellees after receiving within a small number of the entire quantity of staves

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mentioned in the contract, seized a large number of staves which had been delivered by A. to the mortgagee of the land on account of the mortgage indebtedness, to reimburse them for advances made to A.

Held, that the title to the staves in controversy did not pass to the appellees under the terms of the contract.

Held, also, that something was necessary to designate or indicate the staves before it could be said that any given staves or lot of staves passed under the contract.

SAME.—Article to be Manufactured.—When Title Passes.—A contract for the sale of an article to be manufactured is an executory contract, and ordinarily no title passes until the thing is completely done and notice given to the vendee, or some act done by the vendor designating it as the thing sold, either by setting it apart, marking it, or some other similar act.

CHATTEL MORTGAGE.—When Recording Necessary.—Recording is only necessary to the validity of a chattel mortgage when possession of the mortgaged chattel is not delivered to the mortgagee and retained by him.

From the Scott Circuit Court.

E. Moser, W. E. Niblack, T. M. Clarke, C. S. Dobbins, J. T. Rogers and H. Q. Houghton, for appellant.

T. J. Brooks, W. K. Marshall, A. M. Munden, C. L. Jewett and M. Storen, for appellees.

McBRIDE, J.—This was a suit by the appellant to recover of the appellees for the alleged conversion of a lot of staves which the parties agree were of the value of \$2,296.86. Both parties claimed title to the staves by purchase from one George S. Beeman.

The facts are substantially as follows: February 4th, 1885, Beeman bought certain land of appellant. The principal value of the land was in the timber growing on it, and Beeman bought it for the purpose of cutting and utilizing the timber in the manufacture of staves. An unpaid balance of the purchase-price was secured by a mortgage on the land. May 21st, 1885, Beeman executed to the appellees the following instrument:

"\$8,051.40. SEYMOUR, IND., May 21st, 1885.

"Received of Gibson & McDonald eight thousand and

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fifty-one dollars and forty cents, being part payment on four hundred thousand (400,000) of my first manufacture of merchantable white oak rived staves, of the following dimensions: Not less than 34 inches long, must be cut by 36-inch measure, and to be $\frac{3}{4}$ to $\frac{1}{2}$ of an inch thick on heart edge, and to be $4\frac{1}{2}$ inches wide, clear of the sap. Also three hundred thousand (300,000) of my first manufacture of merchantable sawed staves, 34 inches long, 4 to 7 inches wide, average 5 inches wide, including the sap, and $\frac{3}{4}$ of an inch thick. I agree to deliver F. O. B. cars at Shoals, and at first switch east of Shoals, all the above named staves by December 1st, 1885, for which the said Gibson & McDonald agree to receive, at Seymour, at sixteen dollars per thousand for the rived staves, and seventeen dollars per thousand for the sawed staves, their inspection, and to pay freight on the same to Seymour. I further agree that the title and ownership of all the timber and staves bought by me shall vest in the said Gibson & McDonald until this contract is complied with. The said Gibson & McDonald agree to furnish the said G. S. Beeman a sufficient amount of money from time to time to pay for making and hauling the above named staves.

G. S. BEEMAN.

"GIBSON & McDONALD."

Up to November 20th, 1885, Beeman had furnished to the appellees under this contract 696,970 staves, or within 3,030 of the number contracted for, and Gibson & McDonald had accepted them. Gibson & McDonald continued furnishing Beeman money up to December 1st, 1885, and in all paid to him \$13,941.41, which was much more than the value of the staves received.

In September, 1885, a portion of the purchase-money for the land being due and unpaid, Fordice forbade Beeman cutting or removing any more timber until he was paid, threatening injunction proceedings. At that time the staves in controversy, 159,755 in number, were manufactured and in Beeman's stave yard. About the last of October, 1885,

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Beeman turned them over to Fordice to apply on his indebtedness to him. Afterward, by arrangement with Fordice, he hauled them to the railroad, and on the 17th day of December, 1885, after the delivery at the railroad was complete, Beeman executed to Fordice the following:

"This certifies that I have this day sold and delivered to Nelson Fordice the following personal property in Martin county, to wit: 159,755 staves, now on line of railroad in Hubert township, in consideration of which said Fordice is to credit my notes, made payable to him when said staves are sold; and should said staves sell for more than sufficient to pay such as may be due on said notes when sold, then said Fordice is to pay over to me the remainder. But should said staves not sell for enough to pay said notes, then I am to pay the balance due, or to become due, to said Fordice. It is especially understood and agreed that this contract is not, in any way, to affect the remedy that said Fordice now has against me on any notes whatever. Same not to be sold under market prices.

"Dated this 17th day of December, A. D. 1885.

"G. S. BEEMAN."

The appellees, finding the staves where they had been placed by Beeman, claimed them under their contract and took and used or disposed of them as their own. The principal controversy is over the construction to be given to the contract between Beeman and the appellees.

The appellant insists that the contract was executory, and that the appellees never acquired any title to the staves in controversy, while the appellees insist that by its terms the title to all the timber from which the staves were made was vested in them, and that the staves, as fast as they were manufactured, became their property.

The contract is for the sale of an article to be manufactured. Such contracts are executory, and ordinarily no title passes until the thing is completely done and notice given to the vendee, or some act done by the vendor designating

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it as the article sold, either by setting it apart, marking it, or some other similar act. Benj. Sales, Am. notes, sections 352-357; *First Nat'l Bank, etc., v. Crowley*, 24 Mich. 492; *Ballentine v. Robinson*, 46 Pa. St. 177; *Moline Scale Co. v. Beed*, 52 Iowa, 307.

Even in the case of articles manufactured expressly for a party, title passes only upon completion according to the contract and delivery, or tender of delivery. Benj. Sales, Am. notes, sections 358-384.

While this is the general rule, it is no doubt competent for the parties to fix, by their contract, a different time when the title will pass, and if it clearly appears from the contract that the parties intended the title to pass at any given time, or at any designated stage of the manufacture, or without any formal delivery or tender, such intention would no doubt govern.

The contract in question is for the sale of a certain number of staves of the vendor's first manufacture, of certain kinds. This is equivalent to saying that out of the staves of that kind first manufactured by the vendor shall be selected, or designated, the given number sold. It does not provide that the first 400,000 of one kind, or the first 300,000 of the other kind, shall be taken, but they are to be of the first manufacture.

Manifestly, something was necessary to designate, or indicate, before it could be said that any given staves or lot of staves passed under this contract. So far as this provision of the contract is concerned, it is clearly within the principle laid down in *Commercial, etc., Bank v. Gillette*, 90 Ind. 268, and other cases decided by this court, both before and since that time, following the same rule.

The case of *Martz v. Putnam*, 117 Ind. 392, cited by the appellees as being decisive of the question in their favor, lends no support to their contention. The contract there considered was, like this, for the purchase of articles to be manufactured by the vendor. Lumber of certain kinds and

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dimensions was to be sawed and piled on sticks in the vendor's lumber yard and was there to be paid for, but was to be afterwards shipped by the vendor at the instance of the vendee. The lumber was sawed and piled according to contract, and invoices being furnished, the vendee stating the amounts and the price, it was all paid for. The piling of the lumber on sticks and furnishing invoices of it was a sufficient identification and designation, and the title passed. In the case at bar, after the manufacture of the staves in controversy, but before anything had been done in the way of delivering them to the appellees, or of designating them as a portion of those sold to the appellees, Beeman sold and delivered them to the appellant.

Appellees contend, however, that, even if there was otherwise doubt as to their title, it is put at rest by the provision vesting in them title to all lumber and staves bought by Beeman until the contract was complied with. We are unable to see how this affects the question.

Assuming that the parties could thus transfer the ownership of the timber, the stipulation in the contract has no relation to any of the staves in controversy, which were manufactured from timber cut on Beeman's own land, and not from timber bought by him. The title to the land had been in Beeman for some months when the contract was made, and it is hardly possible that by the use of the words "timber and staves bought by me" the parties meant timber growing on Beeman's own land. However, even if we assume that they did, and that such stipulation was valid and effectual to transfer the title to the timber, how does this leave the parties? The contract is for 700,000 staves. Of this number 696,970 had been previously delivered, leaving only 3,030 to be delivered to complete the contract. The stipulation in the contract only assumes to vest the title to the timber in the appellees until the contract was complied with, and could, therefore, at the utmost only affect 3,030 of the 159,755 staves.

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Upon the facts before us, and about which there seems to be little if any controversy, the verdict of the jury and judgment of the circuit court are clearly erroneous.

The court, at the request of the appellees, gave to the jury the following instruction :

"The contract read in evidence, between plaintiff and George S. Beeman in regard to the staves in controversy, is in legal effect only a chattel mortgage, and if it was not recorded within ten days after it was executed it is void and of no effect whatever as against Gibson & McDonald, and if Beeman did not own the staves mentioned, but Gibson & McDonald did, it is also void and of no effect against them for that additional reason."

To the giving of this instruction appellant objected and excepted, and it is assigned as error.

Assuming the legal effect of the instrument to be as stated the instruction is clearly erroneous. Recording is only necessary to the validity of a chattel mortgage when possession of the mortgaged chattels is not delivered to the mortgagee and retained by him. Section 4913, R. S. 1881.

Here the staves were delivered to the appellant, and were in his possession when taken by the appellees.

The judgment of the circuit court is reversed, at the costs of the appellees, with instructions to grant a new trial.

Filed Sept. 15, 1891.

The Board of School Comm'rs of Indianapolis v. The State, *ex rel.* Sander.

No. 15,884.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF
INDIANAPOLIS v. THE STATE, *EX REL.* SANDER.

SCHOOLS.—*Study of German.*—*Statute Construed.*—In the act of May 5, 1869, section 4497, R. S. 1881, which provides that “whenever the parents or guardians of twenty-five or more children in attendance at any school of a township, town, or city, shall so demand, it shall be the duty of the school trustee, or trustees, of said township, town, or city, to procure efficient teachers, and introduce the German language as a branch of study into such schools,” the words “any school” mean any place where a public school is taught, with its complement of teachers and scholars.

SAME.—*Where German Must be Taught When Demand is Made.*—Where, under such statute, the requisite demand is made on the board of school commissioners for the teaching of German in a certain school of a city, the requirement of the statute is not met by providing that the language shall be taught in another school of the city when the pupils have reached a certain grade, but it must be taught in the particular school where the demand is made.

MCBRIDE, J., and OLDS, J., dissent.

SAME.—*Refusal to Introduce German Because of Lack of Funds.*—*Insufficiency of Excuse.*—The board of school commissioners can not set up a lack of funds as an excuse for their refusal to introduce the study of German, where it appears that studies not named in the statute as required studies are taught at an expense greater than would be necessary for the teaching of German.

From the Marion Circuit Court.

J. S. Duncan and *C. W. Smith*, for appellant.

L. B. Swift, *W. P. Fishback* and *W. P. Kappes*, for appellee.

MILLER, J.—This was a proceeding by mandate to compel the board of school commissioners of the city of Indianapolis to introduce the German language, as a branch of study, into School No. 22, upon the demand of parents and guardians of children in attendance upon that school.

The action was predicated upon section 4497, R. S. 1881, (Acts of 1869, Sp. Sess., p. 40), which reads as follows:

“The common schools of the State shall be taught in the English language; and the trustees shall provide to have

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taught in them orthography, reading, writing, arithmetic, geography, English grammar, physiology, history of the United States, and good behavior, and such other branches of learning and other languages as the advancement of pupils may require, and the trustees from time to time direct. And whenever the parents or guardians of twenty-five or more children in attendance at any school of a township, town, or city shall so demand, it shall be the duty of the school trustee or trustees of said township, town, or city, to procure efficient teachers, and introduce the German language as a branch of study into such schools; and the tuition in said schools shall be without charge: *Provided*, Such demand is made before the teacher for said district is employed."

The verified petition for the alternative writ alleges, in substance, the following facts:

That one of the schools of the city, under the management of said board of school commissioners, is a school known as Public School No. 22; that the school year of the city extends from September in each year to June of the following year; that before any teachers for said school were procured or employed for the coming year the parents and guardians of one hundred and twelve children in attendance at said school petitioned and demanded of the appellant board that it procure and employ efficient teachers and introduce the German language as a branch of study into said school for the coming school year; that said board refused to grant said demand, but went on and employed teachers to teach all the other branches required by law in said school and still other branches not required by law, but all the time refused to provide for teaching the German language in said school. The petition to the board was set out in full with the names of the children and wards. This suit was begun June 21st, 1890.

To this the appellants answered: That, prior to the filing of the demand for the teaching of German, said board, having considered the grading of the Indianapolis schools and

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the course of instruction therein, and the teaching of German therein, and the employment of teachers therefor, and what branches required by the advancement of pupils should be taught in addition to the statutory branches, all in connection with the revenues, had determined that German should be taught, and could be efficiently taught, for the last seven years of the twelve years' course of said Indianapolis schools; that the revenues of the board would not permit the teaching of German to a greater extent, and the board had determined to employ teachers for the last seven years of the course; that the board had graded the schools; that it had erected buildings in various parts of the city convenient of access to pupils, and had so arranged that pupils in lower grades could attend school nearer home, while those in higher grades, being older and fewer in number, attended at buildings more remotely located; that the number of pupils attending in the last seven years of the course was 5,346, and would be greater the coming year; that the estimated revenue for the coming year would be \$252,973, of which amount \$210,000 would be required for tuition under the present plan of the board; that public school building No. 22 had been erected upon these principles, and that for many years no pupils advanced beyond the fifth year of the school course have attended or been taught at said school building; that none of the pupils mentioned in the petition for teaching German in said school No. 22 have advanced to the sixth grade, and, therefore, they are not entitled to enter classes where German is taught; that as soon as said pupils reach the sixth year they will go to buildings where German is taught, and may there study it; that, with the revenue at command, there is no other feasible method of grading the schools of Indianapolis.

To this answer the appellee replied: That for many years the city has been subdivided for general school purposes by the board by erecting school buildings throughout the city, to which children living near have been assigned for at-

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tendance according to the grades taught; that, whatever have been the grades taught, it has been the custom of parents and guardians to file petitions for the teaching of German like the petition filed with the complaint for the teaching of German in public school No. 22; that the board has complied with said petitions and has introduced the German language accordingly; that until the recent refusal of the board, it was supposed by the community that it would continue such compliance; that at a meeting of the board in June, 1890, it had on motion refused to provide for any teaching of the German language in any of the schools of said city during the coming school year; that two thousand children desired to study the German language, but under the plan of the board, as described in the answer, only three hundred of these could do so; that the board, while refusing to provide for teaching the German language, proposed to provide for teaching the following branches not required by law, at an expense out of the school revenues, as follows:

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| Music | \$13,000 |
| Drawing | 16,000 |
| Manual training | 1,300 |
| Physical training | 3,000 |
| Chemistry | 1,000 |
| Physics | 2,000 |
| Greek | — |
| Bookkeeping | 500 |
| Geometry | 1,000 |
| English literature | 2,000 |
| General history | 500 |
| Algebra | 3,000 |
| Latin | 1,000 |
| Training school for teachers | 1,500 |
| Civil government | 800 |
| Rhetoric | 2,000 |
| Botany | 500 |

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That physical training is a new branch of study which the board intends to introduce for the coming school year; that, if the teaching of the German were provided for by the board wherever demands like the one in the complaint have been made, the same would cost not to exceed \$10,000 for the coming school year; that the number of pupils in the grades comprising the first five years of the schools during the past year was 11,941, and will be greater during the coming year.

To this reply the appellants demurred for want of facts; the demurrer was overruled and exception taken. After trial a judgment was entered directing the mandamus to issue. The appellants appealed, and the only error assigned is that the court erred in overruling the demurrer to the reply.

The claim is made by the appellee that the only question presented by the record is as to the power of the appellants, in their discretion, to refuse to introduce the study of the German language into any of the public schools of the city, notwithstanding the filing of a proper petition therefor by the requisite number of parents and guardians. This claim is founded upon the allegation in the reply that at the meeting of the board held in June, 1890, a motion providing for the teaching of German in all the schools of the city, in which proper petitions were filed for the same, was voted down, and a motion made to provide for the teaching of the language as set forth in the defendants' answer was not finally acted upon, followed by the averment that "said defendants have refused to provide for any teaching of the German language in any of the schools of said city during the coming school year." The appellee insists that the reply shows that the appellants refused to comply in any manner with the mandate of the statute to introduce the language as a study into the public schools, and that, therefore, the court did not err in overruling the demurrer to the same.

To give the language quoted the force and effect claimed for it by the appellee would be to eliminate from the case the

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only question about which the parties litigant disagree ; for the appellants admit, that, upon the filing of a petition by the parents and guardians of the requisite number of children, the statutes imperatively require the language to be taught in the schools.

The answer to which this reply was filed alleges that in May, 1890, the board determined to provide for the teaching of German in some of the grades and schools in the city, and that they would do so without any order of the court.

The meeting of the board at which the motion to employ teachers, and provide for the introduction of the language into the public schools, was held in June. This action was commenced in the same month, and the reply filed on the 11th of July ; the schools were not to begin until September following. There is no express negation of the facts alleged in the answer, that the board intended to make provision for German in the schools before the opening of the school year.

We understand the allegation of the reply referred to, when read in connection with the answer, to mean that the board had, at that meeting, refused to provide for its introduction, and not that they would not do so prior to the opening of the schools in September, in the manner determined upon at their May meeting.

The purpose of the action was to compel the defendants to introduce the study into a particular school ; all the allegations of the petition for a mandate referred to that school ; the theory of the relator confined him to that position. The judgment of the court was in accordance with that theory, and by it the defendants were commanded to employ efficient teachers, and introduce the language as a branch of study into that particular school, no order being made with reference to the other schools in the city.

This case is to be determined by the answer to the question : What did the General Assembly mean by the use of the words " any school," when it said, in the act approved

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May 5, 1869: "And whenever the parents or guardians of twenty-five, or more, children in attendance at any school of a township, town, or city, shall so demand, it shall be the duty of the school trustee, or trustees, of said township, town, or city, to procure efficient teachers and introduce the German language as a branch of study into such schools."

The position of the appellee is that the parents and guardians of more than twenty-five pupils in attendance upon Public School No. 22 having, at the proper time, filed the requisite petition, it became the duty of the Board of School Commissioners to provide for its teaching in that particular school, no matter what arrangements may have been made to have it taught in other schools, and to other scholars.

The position of the appellants is, that, while the filing of the petition makes it incumbent upon the board to have the language taught in the schools of the city, they may, in their discretion, determine in what schools, to what grades of pupils, and for what length of time it shall be taught; and that when they have provided for its teaching in some of the schools of the city, convenient of access to the grades to which the language is assigned, they have fully complied with the law, and can not be compelled to have it taught in Public School No. 22.

In arriving at a correct solution of the question involved, it is instructive to note, in a general way, the origin and growth of legislation upon the subject under consideration.

For many years prior and subsequent to the adoption of our present Constitution, the selection of teachers and designation of the studies to be taught in the public schools were under the exclusive control of school meetings, composed of the patrons of each school. The first legislative recognition of specific studies was in the act of March 4th, 1853, which provided that no persons should be licensed to teach in the public schools unless they possessed "a knowledge of orthography, reading, writing, geography, English grammar."

In section 150 of the act of 1855, which is the rudiment

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of the section under which this action was brought, it was enacted that :

"The common schools shall be taught in the English language: *Provided, however,* That schools may teach other languages, in addition to the English, as a branch of education."

In the act of March 6, 1865, it was provided that "The common schools of the State shall be taught in the English language, and the trustee shall provide to have taught in them orthography, reading, writing, geography, arithmetic, English grammar, and good behavior, and such other branches of learning, and other languages, as the advancement of pupils may require, and the trustee from time to time direct; and the tuition in said schools shall be without charge."

This remained the law until the act of May 5, 1869, *supra*, was enacted.

The first question is, omitting for the present all consideration of the effect of subsequent legislation, to determine if possible the legislative intent in the enactment of this amendment of May 5, 1869, in which, after adding physiology and history of the United States to the required studies, the conditional provision was made for the teaching of the German language.

The act of 1865, which was amended, required seven named branches of learning to be taught, and other studies and languages at the option of the school trustees. It was under that act within the power of the school trustees, if they so desired, to have physiology, history of the United States, and the German language taught in the public schools. The object of the amendment was to compel the teaching of physiology and history of the United States, and to withdraw the German language from the list of purely optional languages that might be taught at the discretion of the trustees, and place it conditionally in the list of required studies. By this legislation the law-making power discrim-

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inates in an emphatic manner in favor of the teaching of the German over that of any other language. This amendment was doubtless brought about by the fact that we had then, as now, a large population speaking the German language who desired that their children should receive instruction in that language.

Taking into consideration the course of legislation, and the circumstances under which it was enacted, we are, if possible, to determine from the reading of the act in what schools the Legislature intended the language should be taught.

The rule of construction to be adopted is provided by statute and is as follows. Section 240, R. S. 1881: "The construction of all statutes of this State shall be by the following rules, unless such construction be plainly repugnant to the intent of the Legislature or of the context of the same statute :

"*First.* Words and phrases shall be taken in their plain, or ordinary and usual sense. But technical words and phrases, having a peculiar and appropriate meaning in law, shall be understood according to their technical import."

As the words used in the act under consideration do not contain technical words or phrases, relating to the disputed question, having a peculiar meaning in law, we must take the words used in their "plain, ordinary and usual sense." In townships, towns and cities, in which but a single school is taught, the solution of the question is easy. The trouble arises in towns and cities in which the schools are taught in many school-houses, placed in different localities, the whole being under one management and control.

While the question may not be entirely free from doubt, we have arrived at the conclusion that the words "any school," as used in this statute, mean and designate any place where a public school is taught with its complement of teachers and scholars. Such we believe to be the ordinary and usual meaning of the word school, and that this con-

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struction is necessary to give effect to the object intended in its enactment. Such, indeed, seems from the reply to have been the construction placed upon the act by the appellants and their predecessors in control of the city schools for many years prior to the year 1890.

By the terms of this act the introduction of no other study into the public schools is made to depend upon the demand or request of the patrons of the school, but on the contrary it has been the evident design of the Legislature to establish, as far as possible, a uniform course of study throughout the whole State.

We take it that the exception to this course of legislation was, primarily, for the benefit of parents and guardians who desired their children and wards to receive instruction in this language, and that a construction that would defeat this purpose ought not to be entertained, if it can be avoided. We are of the opinion that the Legislature contemplated that the parents and guardians of the children in attendance upon a school, who would demand the introduction of the German language, would do so for the purpose of enabling their children and wards to engage in its study, and not for the purpose of enabling some other children and other wards of another grade, and in attendance upon a school, taught in some other school, to receive such instruction.

In this case the parents and guardians of one hundred and twelve pupils in attendance upon Public School No. 22 asked to have the German language taught in that school, with the undoubted motive of having their children and wards engage in its study. In answer to this request the appellants say, in effect, we will not have this language taught in this school, and to your children and wards attending it, but will introduce the study in some other school, in some other part of the city, and to some other pupils. We regard this as a strained and unnatural construction of the words of the act, utterly subversive of the purpose of its enactment.

If the position of the appellants is the correct one, a peti-

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tion by the parents and guardians of twenty-five pupils in attendance upon any one of the many public schools in the city of Indianapolis will cause the introduction of the German language into the schools of the city as effectually and fully as if it had been petitioned for in each school by the requisite number of parents and guardians. We need not characterize a construction that leads to such a result.

Four years after the passage of this act providing for the introduction of German into the public schools, when petitioned for, the Legislature passed the act of March 3, 1871, which is in force only in the city of Indianapolis.

By this act the control of the public schools, which prior to that time had devolved upon the school trustees, was transferred to the board of school commissioners. Among the other duties of their office they were authorized :

"First. To district the city for the purpose of electing school commissioners therein, and also to subdivide the city for general school purposes.

"Seventh. To establish and enforce regulations for the grading of and course of instruction in the schools of the city, and for the government and discipline of such schools." Section 4460, R. S. 1881.

Section 8 of this act (section 4463, R. S. 1881) continues in force within the city all of the general school laws of the State which are not inconsistent with the provisions of this act.

Among the general provisions of the school law thus continued in force is the following :

"The persons listed in each of such towns and cities shall be considered as forming but single school districts therein, distinct from the townships in which they are situate."

It is earnestly contended by the appellants that, inasmuch as all the schools of a town or city form but a single school district, in which the school commissioners may assign the pupils to such school as they choose; and as they are given authority, in their discretion, to "establish and enforce reg-

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ulations for the grading of and course of instruction in the schools of the city," they may determine in what schools, and to what grades of the pupils the German language may be taught. We do not think that the act of 1871 either repeals or modifies the section of the act of 1869, under consideration. In fact we do not regard the provision authorizing the grading of the pupils as greatly enlarging the authority of the school officers in that respect. The power of the school commissioners to establish and enforce regulations for grading the schools, and regulating the course of study, must be exercised subject to the dominant law of the State. The grant of a power which is a mere permission, not a command, to grade the schools or establish a course of study can not be held to authorize the school commissioner to disregard a positive and specific law of the State.

While the city of Indianapolis does, for the purpose of the enumeration and listing of school children, and for many other purposes, constitute a single school district, it can hardly be said to have but one school. The mere statement of the proposition would seem to be sufficient. The act of 1871 authorizes the school commissioners to subdivide the city for general school purposes. The pleadings show that they have subdivided the city for school purposes, and erected school buildings in different parts of the city, and assigned pupils to, and numbered them as different schools. This makes them as effectually and distinctly different schools as those in a country township.

The appellants say in their answer that they have considered the subject of the study of German in connection with their resources, and that with their available resources they can not provide for the teaching of German for any greater length of time than seven years out of the twelve-year course.

We are of the opinion that the allegations contained in the answer showing want of funds are fully met by the reply. The answer shows that the appellants had on hands,

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unappropriated, over \$40,000 more than would be required for tuition upon the system of grading and plan of employment of teachers as adopted by the board. The reply says that it will cost only \$10,000 to provide for instruction in the German language wherever demanded. This is a complete reply to this portion of the answer. But the reply goes further and shows that in the estimated expense of running the schools, as set forth in the answer, there is included a sum in excess of \$60,000 for teaching music, drawing, manual training, physical training, chemistry, physics, Greek, bookkeeping, geometry, English literature, general history, algebra, Latin, training school for teachers, civil government, rhetoric, and botany. None of these studies are named in the statute as required studies, but their teaching is provided for under the general direction for the teaching of "such other branches of learning and other languages as the advancement of pupils may require and the trustees from time to time direct." Under this statute we hold that it is incumbent upon the school authorities to provide for the teaching of those studies that are expressly named and provided for, and that they can not appropriate the school funds for the teaching of optional studies, and then say that they can not comply with the requirements of the statute for want of funds.

We do not desire that this construction of this section of the statute shall be understood as a curtailment of the enlarged discretion given the board of school commissioners in the control, grading and management of the public schools, except in so far as it may be necessary to give full force and effect to the legislative enactment.

The board of school commissioners is a *quasi* corporation, possessing, by necessary implication, such powers as are or may be necessary to carry out the purpose for which it was created; but these powers must be exercised subject to the paramount laws of the State. With reference to the act under consideration, we are of the opinion that when the requi-

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site demand is made it becomes the duty of the board of school commissioners to introduce the German language as a study into the particular school where it is demanded, and that upon their refusal they may be compelled by mandate to act in the matter ; that they have no discretion to refuse, but must act. When they have introduced the study, they are, while acting in good faith, and in the reasonable discharge of their official duties, the exclusive judges of the manner in which it is taught, and the extent to which it shall be studied, whether, for instance, by the teachers in charge of that school, or by some other efficient teacher, who gives instruction in a number of schools.

They are the judges who are to decide how much, or how little, instruction is given, provided it be taught simply as a branch of study. The statute says, in a manner so positive and emphatic that it can not be misunderstood, that the common schools of the State shall be taught in the English language, and any board of trustees, or school commissioners, or other school officer, who, under guise of the provisions of this act, should have a school taught in the German language, would be guilty of misappropriating the school funds, and become liable therefor on his official bond.

We are met by the argument that by this construction the German language, as a study, has an advantage over every other study, and that to do so is inexpedient and unjust. We did not enact this statute, and it is no part of our duty to pass upon its expediency. That was for the Legislature. Our duty is to construe, not to criticise.

We are not, however, apprehensive that the fears expressed in argument will be realized. We have no doubt but that the board of school commissioners, in its wisdom, will be able to devise means by which the law will be carried out in good faith, without serious interference with the grading of the schools.

We are, in this case, not called upon to decide, and do not decide, that the language shall be taught in each school

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room, and it would be improper to express an opinion upon that subject. Neither can we judicially take notice that the German language may not, like good behavior, which is one of the required studies, or like music or physical training, which are optional ones, be taught in any grade without interference with other studies.

In our opinion the court did not err in overruling the demurrer to the reply.

Judgment affirmed.

Filed June 23, 1891.

DISSENTING OPINION.

MCBRIDE, J.—In my opinion a fair statement of the precise question involved and decided in this case is as follows:

The necessary preliminary steps having been taken, the German language was introduced as a branch of study in the schools of the city of Indianapolis. The board of school commissioners of the city (corresponding to the board of school trustees of other cities and towns in the State), assuming that this branch of study was thereafter to be dealt with precisely as any one of the other nine required branches, graded the schools accordingly, and assigned it its place in the course of study, as they assigned a place to English grammar, to arithmetic, and to other branches. By the course of study thus fixed, the study of the German language commenced with the beginning of the sixth year, and continued thereafter during the remaining seven years of the course.

None of the pupils in school No. 22 were advanced beyond the fifth year, and were consequently not sufficiently advanced to be assigned to the grades in which German was taught.

The answer, or return, to the alternative writ of mandamus avers that the board had taken under consideration the subject of teaching the German language, and had decided that "the last seven years of the course of instruction was the period in which the German language, as a branch of study,

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could be most efficiently taught, with the means under the control of said board of school commissioners; * * * that it is the intention, and has at all times been the intention, of said board of school commissioners to provide for the efficient teaching of the German language as a branch of study for all pupils attending the schools of said city, who have advanced in their studies to the beginning of the sixth year of the course of instruction, and to provide efficient teachers to that end; * * * that as soon as said pupils" (in school No. 22) "have advanced to the beginning of the sixth year in the course of instruction, as prescribed by the board of school commissioners, and thus entitled to be admitted to classes, or grades, wherein the German language is taught, they will be admitted into such grades in other buildings in which such grades and the German language are taught, which buildings have been provided convenient of access to such pupils."

These facts do not seem to be controverted. The appellee, in this case, assuming that the board had no discretion in the matter, as to that study, at least, but must provide for teaching it in that particular school, and to that particular grade, regardless of the system of grading and course of study, and regardless of the age and acquirements of the pupils attending there, brought this suit to compel them to break up their system of grading and teach the German language to the particular pupils who were instructed in school No. 22. The contention of the appellee can not be sustained without adjudging that, while the Legislature has assumed to intrust the management of the schools of the city to certain officers elected by the people because of their assumed fitness, and acting under the sanction of an official oath, and has said in express terms that they are authorized "to establish and enforce regulations for the grading of, and course of instruction in, the city," as to at least one study, they have given these officers no independent authority whatever; and although their deliberate judgment may be that the best in-

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terests of the schools require the teaching of that study only to certain grades, and to pupils who have reached a certain degree of proficiency, they may be compelled, by the strong arm of the courts, to change the course of study at the demand of persons who are charged with no duty or responsibility, and who, while they may be as well, or better, informed and qualified to pass on such questions as the members of the board, may, on the other hand, know as little of the management of schools as a babe does of logarithms.

With all due respect to my associates, this is a fair statement of the interpretation given to the law by the majority opinion herein, after giving due weight to every attempted limitation. Indeed, by every rule of logic, notwithstanding the attempt to limit the question decided, it goes much further, and, as I will hereafter show, undermines every vestige of authority to grade, and to establish and maintain any systematic course of instruction in graded schools.

Counsel for appellee, in their brief, denounce the power which the Legislature has intrusted to school officers to grade schools, and regulate their course of study, as "the pretended bulwark behind which the pedagogic martinet exercises his petty tyranny, and school boards here and there carry a high and unlawful hand."

The decision of this case leaves but little, if anything, remaining of that "bulwark," although under its shelter the public schools of Indiana have reached a degree of efficiency second to the schools of no other State, and of which the people of the State are justly proud.

It involves the determination of questions of the highest importance to the people of the State, not because it is of special importance to the people generally what is done in school No. 22, in the city of Indianapolis, but because its decision involves the determination of principles which can not be confined in their application to school No. 22; nor alone to the schools of that city, but reach and affect every graded school in the State. If the effect of the opinion of

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the majority of the court could be limited to that particular school, or even to that city, I would hardly feel justified in dissenting. But in this country few questions concern more nearly the common interests of all the people than those affecting our common school system, and anything, the tendency of which is to impair its efficiency, or seriously impair any of its essential features, demands earnest protest, and opposition, from all who are placed where they may be held responsible therefor.

The law gives to the school officers of every school corporation in the State authority to establish and maintain graded schools. The powers thus conferred upon school corporations, outside of the city of Indianapolis, do not differ in any material particular from those possessed by the school corporation of that city. At all events it will not be claimed that less extensive powers are conferred upon that city than upon other cities and towns in the State.

The statute prescribing the studies which shall be taught is precisely the same as applies to all the public schools of the State. That which the board of school commissioners of Indianapolis may be compelled to do by mandate, by way of changing its course of study, and system of grading, the board of school trustees of every city and town in the State may be compelled to do.

It may be well to consider first, the nature of the power conferred upon school officers, where they are authorized to establish and maintain graded schools.

What is a graded school? The Century Dictionary defines it: "A school divided into departments, taught by different teachers, in which the children pass from the lower departments to the higher as they advance in education."

At page 225 of the Annual Report for 1877, of the United States Commissioners of Education, such a school is defined as "an arrangement of the pupils according to their ages and capacity to study certain things." The establishment and maintenance of a graded school, therefore, involves not only

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the grading of the pupils, according to age, capacity, or acquirement, but the adoption of a course of study, and of rules for the advancement of pupils from grade to grade as they advance in acquirement.

The nature and extent of the power possessed by school officers to direct and control the course of study in the schools in their charge have been many times considered by this court, and the courts of other States.

The case of *State, ex rel., v. Webber*, 108 Ind. 31, was a case involving the power of the school board to add music to the list of prescribed studies, and to suspend from the school those who refused to pursue that study. The court held that the making of a rule of that character was an exercise of the discretionary power possessed by the board, and denied mandamus to compel the admission of a pupil suspended for refusal to comply with it. In the course of the opinion the court said :

" It was competent, we think, for the trustees of the school city of La Porte to enact necessary and reasonable rules for the government of the pupils of its high school, directing what branches of learning such pupils should pursue, and regulating the time to be given to any particular study, and prescribing what book or books should be used therein. *

* * The power to establish graded schools carries with it, of course, the power to establish and enforce such reasonable rules as may seem necessary to the trustees in their discretion, for the government and discipline of such schools, and prescribing the course of instruction therein. * * *

" Where such trustees may have established a system of graded schools, or such modifications of them as may be practicable, within their respective corporations, they are clothed by law with the discretionary power to prescribe the course of instruction, in the different grades of their public schools. * * * The important question arises, which should govern the public high school of the city of La Porte, as to the branches of learning to be taught and the course of instruc-

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tion therein, the school trustees of such city, to whom the law has confided the direction of these matters, or the mere arbitrary will of the relator, without cause or reason in its support? We are of the opinion that only one answer can or ought to be given to this question. The arbitrary wishes of the relator, in the premises, must yield and be subordinated to the governing authorities of the school city of La Porte, and their reasonable rules and regulations for the government of the pupils of its high school."

Upon the question of the discretionary power possessed by the school officers in the management of the schools placed in their charge, the authorities overwhelmingly support the doctrine above laid down.

In *Guernsey v. Pitkin*, 32 Vermont, 224, the following language is used by Redfield, C. J.:

"But in regard to those branches which are required to be taught in the public schools, the prudential committee and the teachers must of necessity have some discretion as to the order of teaching them, the pupils who shall be allowed to pursue them, and the mode in which they shall be taught. If this were not so, it would be impossible to classify the pupils."

In *Ferriter v. Tyler*, 48 Vermont, 444, the court says: "It stands out so plain as not to be matter for debate, even if it be not expressly conceded, that schools, in order to realize the intent of the Constitution in their behalf, must be subjected to system and order under established rules."

In *Donahoe v. Richards*, 38 Maine, 379, it is said: "If the right to direct the course of instruction and the books to be used is given, the right to enforce obedience to the determining power must manifestly exist, or the determination will be ineffectual. It would be worse than idle to grant this power to direct, if any one can set at naught the action of the committee."

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In *Roberts v. City of Boston*, 5 Cushing, 198, it is said: "The power of general superintendence vests a plenary authority in the committee to arrange, classify, and distribute pupils, in such a manner as they think best adapted to their general proficiency and welfare."

In *Hodgkins v. Inhabitants of Rockport*, 105 Mass. 475, the Supreme Court of Massachusetts says of a statute which says that school officers "shall have the general charge and superintendence of all the public schools in town," that "This general power, by necessary implication, includes the power to make all reasonable rules and regulations for the discipline, government and management of the schools."

To the same effect are the cases of *Sewell v. Board, etc.*, 29 Ohio St. 89; *Fertich v. Michener*, 111 Ind. 472; *King v. Jefferson City, etc.*, 71 Mo. 628 (36 Am. Rep. 499), and many other cases that might be cited.

The case of *Trustees, etc., v. People, ex rel.*, 87 Ill. 303 (29 Am. Rep. 55) is one of a line of cases opposing the principle laid down in *State, ex rel., v. Webber, supra*, in so far as affects the right of the parent to elect what studies in the prescribed course may, and what may not, be pursued by his child, it being there held that the parent may thus elect. To the same effect is *Morrow v. Wood*, 35 Wis. 59 (which is probably the leading case taking that view); *Rulison v. Post*, 79 Ill. 567, and some other cases. These cases, however, while holding that a pupil can not be compelled to pursue a certain study against the will of the parent, expressly recognize and declare the right to classify and grade, and that there can be no interference by the parent with that right. While the parent may say that his child shall not be required to pursue certain studies, as to such studies as the child does pursue he must conform to the established rules, and must take them in the order in the classes, and in the manner prescribed by the school officers.

In *Trustees, etc., v. People, ex rel., supra*, it is said: "Under the power to prescribe necessary rules and regulations

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for the management and government of the school, they may, undoubtedly, require classification of the pupils with respect to the branches of study they are respectively pursuing, and with respect to proficiency or degree of advancement in the same branches. * * * All regulations or rules to these ends are for the benefit of all, and presumptively promotive of the interests of all. No parent has the right to demand that the interests of the children of others shall be sacrificed for the interests of his child; and he can not, consequently, insist that his child shall be placed or kept in particular classes, when by so doing others will be retarded in the advancement they would otherwise make; or that his child shall be taught studies not in the prescribed course of the school. * * * * The rights of each are to be enjoyed and exercised only with reference to the equal rights of all others." And in *Morrow v. Wood*, *supra*, it is expressly stated that "The parent did not propose to interfere with the gradation or classification of the school, or with any of its rules and regulations, further than to assert his right to direct what studies his boy should pursue that winter;" that is, that he should be allowed to omit a certain study, and thus stay out of certain of the established classes. If the opinion of the majority of the court, in this case, should stand as declaratory of the law, it will be unique, as being the first and only case under a statute which confers on school officers general power over, and control of, the public schools to declare the rights of the parent, instead of the school officer, to control the gradation and classification of the pupils. It is against all the authorities, and in principle expressly overrules *State, ex rel., v. Webber, supra*.

Power to establish and maintain graded schools has been possessed by the school officers of this State for more than thirty-five years, the act of March 5th, 1855, 1 G. & H. 542, containing this provision, section 8: * * * "They may also establish graded schools, or such modifications of them as may be practicable."

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The act of March 6th, 1865, 1 Davis Stat. 778, contains the following: "Section 10. The trustees shall take charge of the educational affairs of their respective townships, towns and cities. * * * * They may, also, establish graded schools, or such modifications of them as may be practicable; and provide for admission into the higher departments of the graded school, from the primary schools of their townships, such pupils as are sufficiently advanced for such admission."

The law which authorizes the establishment of graded schools, by necessary implication carries with it the power to establish and enforce all necessary and reasonable regulations for grading such schools, and for establishing a course of instruction therein; to assign to each study its place in the course, and to prescribe reasonable rules for the progression of pupils from grade to grade.

In addition to this, the act of March 3d, 1871, confers express authority in the following terms: "To establish and enforce regulations for the grading of and course of instruction in the schools of the city, and for the government and discipline of such schools." Section 4460, clause 7, R. S. 1881.

The statute authorizing the introduction of the German language, as a branch of study, was enacted May 5th, 1869. It declares, in express terms, that when introduced, it is "as a branch of study." Section 4497, R. S. 1881.

This was necessarily done in view of existing laws authorizing the establishment of graded schools, with the attendant power to regulate the course of study, assigning to each branch of study its appropriate place. As a branch of study it is, like the other branches of study, prescribed by the same act, subject to similar regulation by the school officers. To hold otherwise would be to hold that by the act of May 5th, 1869, there was an implied repeal of the statute giving power to grade to school officers, in so far as this one branch of study is concerned. It is, of course, too well settled to require citation of authorities, that repeals by implication are not fa-

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vored, and that the two statutes must, if possible, be construed *in pari materia*, so that full force and effect can be given to each. Again: By what rule of construction can it be said that when the Legislature, two years later, conferred power to establish regulations for the grading and course of instruction in the schools of the city, it intended to and did except one branch, and deny to the school board any control over it? Indeed, as I understand the position and argument of appellee's counsel, it is that the duty is imperative to provide for the teaching of all of the studies prescribed by the statute, in each grade.

In this they are, at least, logical, and if they are right, the power to grade schools and establish a course of study is reduced to a very attenuated shadow, as each person whose children are attending a given school, who wishes them to be taught in any one of the required studies placed in grades in advance of that to which they belong, can compel a change in the course of study for his accommodation. The separate and individual opinion or caprice of the parents will be substituted for the judgment of the officer, while order and system in the school-room will give place to anarchy.

The attempt to limit the application of the principle declared to the one study is ineffectual. It is made to turn on a question of verbal criticism, by which process the conclusion is reached that by the words "any school," as used in section 4497, *supra*, is meant the particular building, or room, with its complement of teachers, pupils, etc., which chances at the time to be occupied by the pupils whose parents have presented the petition, whether the building contains those belonging to only one out of many grades, or, like the ordinary district school, contains those of all grades in one room.

The further conclusion is also reached that school No. 22, although shown to contain only certain pupils belonging to certain of the lower grades in the city school system, is a

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separate and distinct school within the meaning of the law. This process of examination of the statute is entirely too microscopic to afford a solution to the problem. The Legislature, in the enactment of this law, was prescribing a general rule intended to govern all the schools of the State. In perhaps the majority of the towns of the State one large building, containing many rooms, accommodates all the grades; the pupils starting in the primary room, and passing in turn from room to room, as they pass from grade to grade. Suppose, while we find this condition existing in a given town, that in a neighboring town we find, instead of one large building, many small ones, each separate from the others, each with its complement of teachers and pupils, but each accommodating a single grade. With promotion, its pupils pass from building to building as they pass from grade to grade. By the rule of construction thus adopted one town has a single school, and the other has many schools. In the town with the single large building, the parents of twenty-five children attending that school can, upon petition, have the German language introduced as a branch of study; while in the other, although the parents of many times that number petition for it, unless at least twenty-five of them are in one of the buildings they can not have it. If the requisite number of children are found only in one of the buildings, they can have the study introduced into that building and grade, and into none of the others. Did the Legislature intend any such thing? It was evidently the intention that a much broader view should be taken. The child, when it enters a graded school, does not enter it with a view to completing its education in a single grade, but expecting that, as intellect develops, and additional acquirement comes, it shall pass from grade to grade, from room to room; or, if you please, from school to school. It is, of course, unfortunate that many pupils are unable to complete the course, and in that way are deprived of the instruction which can only be given to them in the later years of the course. For this no remedy can

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be devised. It is true of all studies which in the course prescribed, lie beyond the point where they drop out. Under any system of grading which will give time for efficient instruction, some studies must wait while others are being taken. To require children of primary grades to pursue simultaneously all of the required studies, would be to impose on their untrained intellects an unreasonable and unjustifiable tax. It is upon this that all systems of grading are based, with a view to the gradual development and unfolding of the child's mental powers. There can be no forcing of this development. The task of devising the best means of accomplishing this end the law has intrusted to the school board.

It was undoubtedly the legislative purpose in authorizing the introduction of this branch of study, to give opportunity to acquire a practical knowledge of it. How could this be accomplished, if, when it was petitioned for by the requisite number of persons, it was not thereupon to be placed in the course with other studies and provision made for continued and progressive instruction in it? In this case is it expected that the pupils in school No. 22 will acquire a practical knowledge of that study in the brief time they will remain in that grade? It is manifest that in that short time they could at best acquire but a slight and superficial knowledge of the rudiments of the language, which could be of no practical value whatever. We can not think that this is what the Legislature had in view.

In the course of instruction prescribed by the appellants, seven years are devoted to that study; that is, the course of instruction in that study extends over that time. When the parents of school No. 22 asked to have it introduced in that room, did they expect that when, in a few months, promotion carried their children to other grades, instruction in that language would end? When the Legislature provided for the admission of that study into schools, on petition, it certainly meant that it should come in as a branch of study,

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not in a given grade, but in the school, viewing the school as an entirety from the time the pupil entered it until he left. It certainly meant to leave the question as to when and where it could be most efficiently taught, to the officers intrusted with the management of the schools, as they intrusted to them similar discretion with reference to all other studies. And when these officers show the adoption of a plan providing for the thorough teaching of this study to all the school children as soon as they reach a certain grade, and that to this end they have provided buildings convenient of access to all, is it just or fair to characterize this as a proposition to teach the study only to some other children in some other part of the city?

Much false reasoning in this case comes from considering it as a question of adding a *particular* study to the course instead of adding an *additional* study.

Suppose this statute, instead of providing for the introduction of the German language, provided for the introduction, in precisely the same manner, of some of the higher branches of mathematics. Strike out the words "German language" and insert instead "algebra" or "trigonometry" or "geometry." Would any one seriously insist that the Legislature meant that when a petition was presented by the requisite number of persons for its introduction as a branch of study, the board would not only be required to admit it, but might, on demand, be compelled to provide for teaching it to the primary grades?

Suppose the last Legislature had amended the law by additional proviso, in precisely the same words, except that it had called for the introduction of the Hebrew language. A large, intelligent and useful class of our citizens would have special interest in such a law. Indeed, the great mass of our people, believing that the Hebrew scriptures are the word of God, would have special interest in such a law. If the reasoning in the opinion of the majority of the court is sound, the board of school commissioners would not only

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be compelled to admit it as a branch of study, but would be powerless to determine when in the course of study it should be taught, and might, on demand, be compelled to provide for teaching it in the primary grades. All the reasoning, as applied to the German language, would apply with equal force to the Hebrew language, or to the Italian, or French, or the language of Sweden.

I do not question the power of the Legislature to limit the control of school officers in the management of the schools. It has created these officers and conferred such powers as they have. Notwithstanding the fact that time has demonstrated the wisdom of their course, and that the large measure of discretion vested in those officers has been a potent factor in the magnificent development of our school system, the power which created can destroy them, or may in any manner curtail their power.

It is not here a question of legislative power, but the construction of a legislative act. Although, indeed, if one interpretation given to this act by counsel for appellee, in argument, could be correct, there might be a question of legislative power. I refer to the construction which would view this law as enacted for the benefit of Germans.

As a branch of study there can be no objection to the introduction of the German language into our schools. It is a noble language of a great people. It is not only commercially advantageous to our children to be able to use it, but it introduces them to a literature singularly rich and strong. But neither Germans, French, English, nor those of any other foreign nationality can, as such, have any rights in our public schools, and any legislation, attempting to recognize or confer any such right would be void.

Our Constitution, providing for a system of common schools, contemplates a school system for the education of the children of American citizens only, and such an education as will fit them for the duties of American citizenship. That which has made the German immigrant so welcome an addi-

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tion to our population is the readiness with which he becomes Americanized, and the sincerity of his devotion to his adopted country has been sealed on many battle fields. As American citizens, their rights in our common schools are the same as if they were native born. But the doors of the common school can only legally open to those of foreign blood when they renounce their alien allegiance, and pledge fidelity to the United States. I can not think that the Legislature intended by this action to introduce the race question into our schools, or to recognize the principle that any other key than that of American citizenship should, under any pretence, open the school-house door. Sound public policy demands the emphatic declaration that in this country and under our flag there is room for but one nationality, where all have common interests and should have one common language.

In my opinion the German language is, by virtue of the petition presented, and the demand made, one of the required studies in the city of Indianapolis, but that as such it stands upon precisely the same footing as all the other required studies, and should be given its proper place and fair proportion of the time in the course of instruction; that, while the board of school commissioners could be compelled by mandate to admit it to the course, if they refused, their discretion could not, and can not, be further controlled.

Mandate will not lie to control or direct the exercise of a discretionary power by a public officer. *State, ex rel., v. Demaree*, 80 Ind. 519; *City of Madison v. Smith*, 83 Ind. 502; *Jelley v. Roberts*, 50 Ind. 1; *Burnet v. Trustees, etc.*, 50 Ind. 251; *Mitchell v. Wiles*, 59 Ind. 364; *City of Fort Wayne v. Cody*, 43 Ind. 197; *Brinkmeyer v. City of Evansville*, 29 Ind. 187; *Mayor, etc., v. Roberts*, 34 Ind. 471.

Mandate will lie to compel an officer to act, but not to control the manner of his acting, except to discharge a duty specifically enjoined by law. See cases above cited, and also

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State, ex rel., v. Demaree, supra ; City of Indianapolis v. Patterson, 33 Ind. 157.

This is the rule as applied to school officers, equally with other public officers. *State, ex rel., v. Webber, supra ; Fertich v. Michener, supra ; Braden v. McNutt, 114 Ind. 214.*

If the discretion of the school board can be controlled in the matter of this particular study, it can be as to all of the prescribed studies, and there is necessarily subordination of the power of the school board in grading to the will of each individual parent who has a child in attendance in the school. This practically destroys it.

The difference between the views entertained by the majority of the court and my opinion, briefly stated, is this: As they construe the law, a petition and demand will only require the admission of the study of the German language to the particular building in which the petitioner's children are at the time instructed, and to no other part of the school, and the board of school commissioners are powerless to say when that shall be ; while, as I construe the law, when the petition is presented, and the demand is properly made, that language must be placed in the course with the other required studies, for the equal benefit of all, and that the school officers have the same power to assign it its place in the course that they have over any other study.

For the foregoing reasons I can not concur in the opinion of the majority of the court.

OLDS, J., concurs in this opinion.

Filed June 23, 1891.

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No. 15,912.

THE STATE, *EX REL.* WORRELL, v. CARR, AUDITOR.

OFFICE AND OFFICER.—*Officers de facto and de jure.*—*Salary.*—Where a *de facto* officer assumes to retain the office after the qualification of the officer *de jure* and continues to discharge its duties, a payment of salary to such *de facto* officer by a disbursing officer of the State, with full knowledge of the invalidity of the *de facto* officer's title, is no defence to an action for the salary by the officer *de jure*, who has also discharged the duties of the office.

APPROPRIATION.—*For Salary.*—*Constitutional Law.*—In an act appropriating money to pay the salary and expenses of a certain office, a provision that it shall be paid to a certain person named and none other, is unconstitutional and void as attempting to adjudicate as to who is the legal officer entitled to the salary.

From the Marion Circuit Court.

A. J. Beveridge, L. T. Michener, A. C. Harris, J. H. Gillett, F. H. Blackledge, L. M. Campbell and E. G. Hogate, for appellant.

A. G. Smith, Attorney General, L. O. Bailey and P. Daniels, for appellee.

OLDS, J.—The relator filed his petition in this case, asking that a writ of mandate issue against the appellee, the auditor of State, compelling him to draw his warrant on the treasurer of State in favor of the relator for the sum of \$2,500, the amount alleged to be due the relator as his salary as chief of the Indiana Bureau of Statistics.

Issues were joined on the complaint, and a trial had. There were demurrers filed to the paragraphs of answer, and overruled, and exceptions reserved. Errors are assigned on these rulings. On proper request there was a special finding of facts and conclusions of law stated by the court. The conclusions of law were excepted to by the appellant, and a proper assignment of error made thereon.

The questions presented and discussed relate to the right of the relator to the salary alleged to be due him, and his

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right to have a writ of mandate issue compelling the auditor of State, the appellee, to draw his warrant on the treasurer of State in favor of the relator for the sum due him. No question is presented and discussed as to the regularity of the proceedings, or as to the proper parties being before the court.

The facts found by the court show that on the 31st day of May, 1889, the relator, John Worrell, was appointed and commissioned chief of the Indiana Bureau of Statistics, by Alvin P. Hovey, Governor of the State of Indiana; that at the time of his appointment he was a resident voter of the State, of legal age, and in every way eligible to hold the office, and on the day of his appointment he took the oath of office, which was indorsed on the back of his commission, and filed a copy thereof in the office of the secretary of State, and in every way qualified as such officer, and on the same day appellee was notified of the relator's appointment and qualification; that after the relator's appointment he applied for office room in the State Capitol, to be occupied by him as the chief of the Indiana Bureau of Statistics, and was assigned a room for that purpose by the auditor of State, which room was independent and removed from a room occupied by William A. Peelle, Jr., and said relator, Worrell, has been doing work and performing the duties of the chief of the bureau of statistics, independent of work performed by said Peelle, from May 31st, 1889, to November 19th, 1890.

At the time relator Worrell was appointed, commissioned, and qualified as chief of the Indiana Bureau of Statistics, said office was held and occupied, and the duties thereof were being performed, by one William A. Peelle, Jr., a person who was eligible to fill the office, who held said office under and by virtue of an election thereto by the Fifty-third, Fifty-fourth, and Fifty-sixth General Assemblies of the State of Indiana, and was commissioned under said first two elections by Governors Porter and Gray, which commissions set out the elections and certified thereto; that Governor Hovey re-

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fused to issue to said Peelle a commission under the election of said Peelle to said office by the Fifty-sixth General Assembly; that Peelle claimed and had no other title to said office, except as herein above found, said office being vacant except as so occupied and claimed by Peelle and Worrell.

The findings further show that Worrell demanded of Peelle possession of the office immediately after his appointment and qualification, and Peelle refused to surrender it, and that Worrell immediately commenced *quo warranto* proceedings against Peelle for the possession of the office, which were twice appealed to the Supreme Court, and reversed, and were not disposed of until after the State election in 1890, at which election Peelle was duly elected to said office, and was commissioned by the Governor, and qualified as such officer, and on Peelle's motion, supported by proof of his election, the *quo warranto* proceedings were dismissed; that during all of the time Peelle continued to occupy the apartments as he had previous to Worrell's appointment, and retained the archives of the office, collected information and made records the same as he had done prior to Worrell's appointment; that the salary of the chief of the bureau of statistics is \$1,800 per year, and there is money in the treasury of the State of Indiana subject to be paid out on warrants of the auditor of State, for the payment of the salary of said chief; that relator has, prior to the commencement of this suit, demanded of the appellee that he draw a warrant in relator's favor for this salary, and since November 4, 1890, he has made demand upon the appellee that he draw such warrant for the sum of \$2,550, said sum to be paid to him as salary from May 31st, 1889, to November 1st, 1890, and presented itemized and qualified bills therefor, as required by law, and appellee has refused to draw such warrant; that on October 31st, 1889, appellee drew his warrant on the treasurer of State in favor of William A. Peelle, Jr., demand having been made by said Peelle for the sum of \$750 as salary, or by way of compensation as chief of the Indiana Bu-

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reau of Statistics, from May 31, 1889, to November 1, 1889; otherwise said appellee has not drawn his warrant on the treasurer of State in favor of any person for the salary of said office.

There is a further finding in regard to the provision of the laws appropriating the amount of the salary of such office, and a provision that it should be paid to Peelle as such chief.

On the foregoing facts the court stated, as a conclusion of law, that relator was not entitled to a writ of mandate, as prayed in his petition.

The act of the Legislature, approved March 29th, 1879, creating a State bureau of statistics, made it the duty of the bureau to collect, systematize, tabulate, and present in biennial reports, statistical information and details relating to agriculture, manufacturing, mining, commerce, education, labor, social and sanitary condition, vital statistics, marriages and deaths, and the permanent property of the productive industry of the people of the State. The first section of this act provides that the department is established for the collection and dissemination of information hereinafter provided, by biennial printed reports to the Governor and Legislature of the State, and it provides for the appointment of the chief by the Governor. Acts of 1879, p. 193.

Some amendments have been made to this act. By an act passed in 1883 (Elliott's Supp., section 1852), an attempt was made to change the method of selecting the chief, and provide for his election by the General Assembly, and by an act in 1889 (Elliott's Supp., sections 1854 to 1862, inclusive), some additional duties were added, and it was made the duty of the chief to transmit one copy of the biennial report to each county and State officer. The duty of the bureau is to gather such information as is required by the law, systematize it, and publish it in proper printed reports, and to disseminate such information by printed reports of all such information collected, and distributing them to the Gov-

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ernor of the State, the General Assembly, and to each State and county officer of the State. There is no law providing that any public records shall be kept of such information save the printed reports. The benefits to be derived on account of such a bureau is through the publication and distribution of the biennial reports. It is provided that headquarters for the bureau shall be furnished by the State.

The findings of fact show that the relator, Worrell, had been assigned and provided office-rooms by the auditor of State in the State-house. There was nothing to prevent him from discharging the duties of the office, collecting and systematizing the information contemplated by the law, and publishing the same in printed reports, and distributing them with the same efficiency and to the same extent as if Peelle had surrendered the apartments occupied by him previous to that time ; and the findings of fact show that Worrell did discharge the duties of the office in compliance with the law. It is true, there is a finding that Peelle was in possession of the archives and records of the office. What the archives and records were that he was in possession of, the findings do not show. The law makes no provision whereby such officer is required to keep any public records or anything else to be kept in connection with and belonging to the office, there to remain as the property of the State, which the outgoing officer would be required to turn over to his successor. The findings of fact show that Worrell was eligible to the office ; that he was duly appointed, commissioned, and qualified as such officer ; that the appellee, the auditor of State, had notice at the time of his appointment and qualification ; that he made application to the auditor of State for apartments, and the auditor of State assigned him apartments for headquarters of the bureau ; and that he occupied them, and discharged the duties of the office. It is further found that Peelle retained the apartments formerly occupied by him, and continued to act, or assumed to act, as chief, and collect information

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the same as he had done before; but the findings show that he had no title to such office, except through a pretended election by the General Assembly. In the adjudication in the *quo warranto* proceedings the main question in this case was settled by the decisions of this court on appeal. *State, ex rel., v. Peelle*, 121 Ind. 495, and *State, ex rel., v. Peelle*, 124 Ind. 515.

By these decisions, between these same parties, the law was settled that the statute authorizing the election of a chief of the bureau of statistics by the General Assembly was unconstitutional and void, and that the election and commission of Peelle gave to him no title to the office, and that the Governor was authorized to appoint to fill the vacancy until the office was filled by an election. Under these decisions, the facts found in this case show that Worrell was, during the time from his appointment and qualification, up to the date of the election and qualification of Peelle as his successor, the *de jure* officer; not only the *de jure* officer, but in possession of, and discharging the duties of, the office. When he was appointed by the Governor, and qualified, he became the *de jure* officer; and when he was assigned quarters by the auditor of State in the State Capitol, to occupy as headquarters for the bureau, and discharge the duties of the office, he was equipped in full to discharge all the duties incident to the office, and he did discharge the duties from thence forward until his successor was elected and qualified. Being a *de jure* officer, and in possession of, and discharging the duties of the office, under all the authorities he is entitled to the salary. Indeed, the later and better reasoned cases hold that the salary is an incident to the office, and belongs by law to the person holding the legal title to the office, and that he can sue and recover it regardless of the fact whether he is occupying and discharging the duties of the office or not, if he be willing to do so, but is kept out by another who is claiming to act as an officer *de facto*.

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This would seem to be the true theory, though it is not necessary to go to that extent in this case, as, under the facts found, Worrell was not only the *de jure* officer, but was, in fact, in possession, and discharging the duties of the office during the time for which he claims salary. It is true, the State and the public are interested in having a public office filled; and when one holds an office, though without title, and acts as an officer *de facto*, and keeps out the *de jure* officer, and while so in possession discharges the duties of the office, the public good demands that the acts of such *de facto* officer, in so far as they affect third parties or the public, be declared valid; but there is no valid reason for declaring that, as between the *de jure* and *de facto* officer, the *de facto* officer is entitled to the salary, or that he, by excluding the *de jure* officer, can prevent him from receiving the salary, or for holding that where one charged with the duty of paying the salary, when with knowledge of all the facts he pays to the *de facto* officer, he shall be relieved from paying to the *de jure* officer. The disbursing officer can not be sued or compelled to pay a *de facto* officer. When the *de facto* officer sues for his salary he brings in question the title to the office, and he can not recover without establishing his legal right and title to the office. To hold that payment by a distributing officer to a *de facto* officer exonerates him from liability to the *de jure* officer for the salary, but stimulates irresponsible persons to cling to an office without even a shadow of title, and exclude the lawful occupant, with a view of recovering the salary of the lawful occupant to the office; but under the facts in this case we are not required to go to the extent of holding that the *de jure* officer, out of possession, can recover his salary notwithstanding another is occupying and discharging the duties of the office as an officer *de facto*; for in this case the facts found show Worrell to have been an officer *de jure*, in possession of the apartments assigned to him by the proper officer, the auditor of State, and discharging the duties of the office, so that the

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headquarters of the bureau of statistics of the State of Indiana were, both in law and in fact, in the apartments in the Capitol building set apart for occupancy by Worrell, the legally appointed, commissioned, and qualified chief of the bureau of statistics; and, as it seems to us, it would be a travesty on justice to hold that Worrell, under such a state of facts, could be prevented from recovering his salary, or that the auditor of State could refuse to draw a warrant, or the treasurer of State refuse to pay a warrant for his salary, notwithstanding Worrell is the lawful officer in possession; but on account of Peelle continuing to occupy rooms theretofore occupied by him, and to gather statistics, after it has been held by the Supreme Court of the State that the law under which Peelle claims to have been elected is unconstitutional and void, and the commissions issued in pursuance of such election gave him no title to the office. Indeed, the facts found show that Peelle terminated the *quo warranto* proceedings by abandoning any claim to the office by virtue of his position, and the election by the General Assembly, and set up his title to the office by virtue of his election by the people, and his commission and qualification, dismissing the case upon the grounds that after his election and qualification he was the legal chief of statistics, and no judgment or ouster could be rendered against him. The appellee had full knowledge of Worrell's appointment and qualification; he assigned him apartments to occupy as such officer; he knew that he was in possession of the office, as he had assigned him the apartments in the State Capitol which he occupied. Worrell is entitled to recover the full amount of his salary, and to have a warrant drawn on the treasury by the auditor of State for the amount, unless the provision of the law naming Peelle as the chief, to whom the salary is to be paid, prohibits the payment to the legal officer, and this we will now consider.

As we have seen, Peelle was not the legal officer, and Worrell was the legal officer, in possession of the office, dis-

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charging the duties of the office. The proposition contended for is that, notwithstanding Worrell was the legally appointed and qualified officer, discharging the duties of the office for which a salary is fixed, and to which the legally qualified officer is entitled as an incident to the office, the Legislature can make an appropriation to pay the salary which Worrell has earned, and to which he is entitled, and, without any legal authority to do so, name Peelle as such officer, chief of the bureau of statistics, and appropriate an amount to pay the salary of the chief, and provide it should be paid to Peelle, and none other; and such a clause in a law would be valid, providing for the payment to Peelle of the salary earned by and due to Worrell. The statement of the proposition carries with it the fallacy of it. That such a provision is invalid seems too clear to admit of discussion. It is directly appropriating a salary due to one, and which is the property of one, for the benefit of another.

By an act of the General Assembly, approved March 11th, 1889, there is appropriated "For all of the expenses of the bureau of statistics, authorized by law, including the salary of the chief of said bureau, of all assistants, all travelling and office expenses, including all blanks, stationery and postage, to be paid out on the itemized and qualified bills of the chief of the bureau of statistics, eleven thousand dollars; for the year ending October 31, 1889, the sum of four thousand dollars." Stopping with this provision of the law, no complications could arise. It expressly provides that the several sums shall be paid out "on the itemized and qualified bills of the chief." But there follows in a separate clause of the act a provision in the law providing that "the several sums so appropriated by this act for said bureau of statistics shall be paid to William A. Peelle, Jr., chief of said bureau, elected by this General Assembly, or to his successors in office appointed pursuant to an act of the General Assembly, in case of the death, removal from the State or resignation of said William A. Peelle, Jr., and to no other person or persons."

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It is evident that this provision was inserted in the law, not with a view to paying the salary to Peelle, regardless of the fact as to whether he was the legal chief of the bureau or not; for the appropriation is made with a provision that it shall be paid out on the itemized account of the chief. The clause relating to Peelle evidently was inserted upon the theory that he was the legal officer. Certainly, no legislative body would so far forget its duties and obligation to the State as to endeavor to elect an officer without authority of law, and endeavor to forestall any effort on behalf of the legally elected officer to recover the office, or discharge its duties by placing the appropriation in such condition that the salary belonging to the legal officer, and incidental expenses of the office, could not be recovered by the legally elected or appointed and qualified officer. To hold that the General Assembly intended to provide that the person chosen by the General Assembly should hold the office, right or wrong, and should receive the salary, or, at least, that no other person, though legally entitled thereto, should receive the salary or draw the sum so appropriated for running such office and department of the government, would be attributing improper motives to its members. Courts should not impugn the motives of legislators; and it would be impugning their motives to hold that they intended, by the provisions of this law, to declare that the person the General Assembly elected to this office should have the salary and draw the amount appropriated, though the election is illegal, and he may have no right to the salary or the money, notwithstanding another has been lawfully elected, or appointed, and qualified, and become the lawful chief of said bureau. Certainly, such was not the intention of the Legislature, and the act would be absolutely void if it was. The legislative department has the right, and it is its duty, to make appropriations for the payment of salaries, and the expense of running the various departments of the State government.

Whether salaries might not, in some instances, be recov-

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ered without an appropriation, is not necessary to decide, but it is certain that there is no authority to go through the formality of electing an officer to an office then in existence, though the election be void, and appropriating funds to pay the salary of the legal officer, and providing that such sum should be paid to the officer having no title to the office. To enunciate such a doctrine would be to hold that the Legislature might convene and choose persons to fill all of the State offices, and appropriate money to pay the salary of the legal officer, and then declare that in such instances it shall be paid to the person so chosen by the Legislature to fill such office, and to none other.

The Constitution provides that no person charged with official duties, under one department of state, shall exercise any of the functions of another. Article 3, section 1. The part of the law making an appropriation to pay the salary of the chief, and to pay the expense of the bureau is the exercise of a legislative function; but that portion which declares that the said sum shall be paid to Peelle is an attempt to exercise judicial powers by declaring who is the legal chief of the bureau of statistics, and entitled to the salary, and such provision is absolutely void. There is a like provision in the law relating to other officers in charge of State institutions.

Section 4 of the act (Elliott's Supp., sec. 2239a) provides that "If the auditor of State shall draw his warrant for any of the sums herein appropriated, or for any part thereof, to any person or persons except those herein named, when the persons to whom the same are payable are designated or named herein, or if the treasurer of State shall pay any of said sums or any part thereof, except to such persons herein named, he shall be guilty of a felony," etc.

What we have said in regard to the provision of the law relating to the naming of Peelle as the person to whom the amount shall be paid, is equally applicable to this. It is, in effect, in the first instance, an attempted adjudication as to

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who the legal officers are, and then an effort to enforce the judgment by providing a penalty for disobeying it.

The legal officers are entitled to their salaries, and money appropriated for conducting a department of State, or a public institution, should be drawn by the officer legally entitled to receive it, and not by any certain person, regardless of whether he has been legally elected, or is in possession of the office or not; and it is not within the province of the Legislature to declare in an appropriation bill who are, or who are not, the legally elected officers of any department. They probably may provide against the paying out of the money to any person other than the legally qualified and acting officer, or officers, and subject the officer to a penalty for paying the same to any other than such officer, or officers; but it can not adjudicate as to who are the legal officers, and provide that payment shall be made to them and none other.

The conclusion we have reached is well supported by the most recent and well-reasoned cases, although there is some irreconcilable conflict in the authorities, particularly in the earlier cases.

In *Andrews v. City of Portland*, 79 Maine, 484 (10 Am. St. Rep. 280), it was held that a *de jure* officer might recover his full salary from the city notwithstanding another had been in possession of the office, and kept the *de jure* officer out, and the salary had been paid to the person acting as an officer *de facto*, the city having notice that the officer *de jure* claimed he was illegally deprived of the office; that the city was not entitled to credit for what the *de facto* officer earned by his personal services. In that case the court says:

"A *de facto* officer has no legal right to the emoluments of the office, the duties of which he performs under color of an appointment, but without legal title. He can not maintain an action for the salary. His action puts in issue his legal title to the office, and he can not recover by showing merely that he was an officer *de facto*. In *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730, the court says:

The State, *ex rel.* Worrell, v. Carr, Auditor.

'It is abundantly settled by authority that an officer *de facto* can, as a general rule, assert no right of property, and that his acts are void, as to himself, unless he is also an officer *de jure*.' In Cro. Eliz. 699, the doctrine is tersely stated as follows: 'The act of an officer *de facto*, when it is for his own benefit, is void; because he shall not take advantage of his own want of title, which he must be conscious of; but where it is for the benefit of strangers or the public, who are presumed to be ignorant of such defect of title, it is good.' "

In a note by the Hon. A. C. Freeman to this case in the American State Reports, in speaking of the cases holding that a payment to the *de facto* officer is a good defence to an action by the *de jure* officer, he says: "These decisions have been placed partly upon the ground that the officer *de jure* had no property rights in the office, and partly upon the ground that his right to the salary or emoluments of his office was not dependent upon the office, but upon the actual performance of his services as a public official; and further, that while there was an officer *de facto* in actual possession of the office, the disbursing officers were not entitled to consider the question of who ought to be in such possession, nor to question the title in any other way than by a proceeding in *quo warranto*. It is believed that none of these grounds are well taken, and most courts which yet maintain the general rule have substantially admitted in subsequent cases that the grounds for it did not in fact exist. In the first place, it is now well settled that an officer *de facto* is not entitled to the salary of the office, and that although he may faithfully discharge its duties, he can not maintain any action against the city or county for the compensation to which he would be entitled if he were an officer *de jure*. * * In the next place, if he has in fact received the emoluments of the office, he has no right whatever to retain them, and he may be compelled to account therefor to the officer *de jure*, in any appropriate form of action. * * If

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a judgment of ouster has been entered against an officer *de facto*, and salary is thereafter paid to him, the officer *de jure* may maintain an action therefor against the city or county, notwithstanding such payment. * * If no part of the salary has been paid during the incumbency of an officer *de facto*, the officer *de jure*, although he performed none of the duties of the office, may maintain an action against the city and county for the salary and emoluments thereof." Mr. Freeman concludes by saying: "Hence the principal case, and cases in California and Tennessee, maintain the doctrine against the weight of authority, but in harmony, we think, with judicial principles, that the payment of the salary to an officer *de facto* in no way impairs the right of the officer *de jure* to recover such salary from the city, county, or other public body charged with the duty of making its payment."

Numerous authorities are cited in support of the doctrine as stated by Mr. Freeman, and we think it lays down the proper rule. See, also, *People, ex rel., v. Smyth*, 28 Cal. 21; *Carroll v. Siebenthaler*, 37 Cal. 193; *People, ex rel., v. Oulton*, 28 Cal. 44; *Mayor, etc., v. Woodward*, 12 Heisk. 499. *Matthews v. Board, etc.*, 53 Miss. 715; *McCue v. County, etc.*, 56 Iowa, 698; *Glascock v. Lyons*, 20 Ind. 1; *Douglass v. State, ex rel.*, 31 Ind. 429.

Judge COOLEY, in a very able dissenting opinion in the case of *Board, etc., v. Benoit*, 20 Mich. 176, holds that the payment of salary to a *de facto* officer is not a defence to an action by the *de jure* officer, and this is in harmony with all general principles of the law. The *de jure* officer is entitled to the possession and emoluments of the office, and he is unlawfully kept out of it by an intruder.

It is inconsistent with all principles of justice and equity that such intruder and unlawful occupant shall have the emoluments for the length of time he can continue in possession, or that the person from whom the salary is due, when he has knowledge of the facts, can set up as a defence

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the fact that a *de facto* officer is in possession of the office and depriving the *de jure* officer of the possession of the office, though, as we have heretofore stated, it is unnecessary to go to this extent in this case, as Worrell, in addition to being a *de jure* officer, was occupying apartments set apart to him by the State, and was discharging the duties of the office as well and as fully as he could in any other place, so that he was both a *de jure* and *de facto* officer. As regards this case, there was an appropriation made to pay the salary of the chief of the bureau of statistics; that money is in the treasury. The only method by which Worrell, who is such *de jure* officer, can recover his salary is by a proceeding in mandate compelling the auditor of State to draw a warrant on the treasurer for the amount.

The auditor refused to draw his warrant and Worrell instituted this suit. The facts found show the money in the treasury; that Worrell is the *de jure* officer; that immediately upon his qualification he was assigned quarters by the auditor of State; that he has discharged the duties of the office. The only possible or pretended defence urged is, that Peelle, who had been acting as a *de facto* chief prior to Worrell's appointment, continued to occupy the apartments which he had theretofore occupied, and to gather statistics and do as he had before done, not having any title to the office, and that the appellee had, with full knowledge of all the facts, paid to Peelle \$750 of salary. These facts constitute no defence to Worrell's action for mandamus to compel the payment of his salary. Worrell was entitled to his mandate, and the circuit court erred in its conclusions of law.

The judgment is reversed, with instructions to the court below to restate its conclusions of law, stating that Worrell is entitled to a mandate prayed for to the full amount of salary due him, \$2,550, and to render judgment accordingly.

Filed June 18, 1891.

Heilman *et al.* v. Heilman.

SEPARATE OPINION.

ELLIOTT, J.—I concur in the conclusion reached in the opinion of the court solely upon the ground that the controversy as to the particular office in dispute is settled by the prevailing opinions delivered in the cases between the claimants to the office on former appeals. Accepting those decisions as the law of the particular controversy, as the court is bound to do, it must follow that Worrell is the rightful officer, and that, as the rightful officer, he is entitled to the compensation attached to the office. The case, in the form it has assumed, is unique, and can not, as I suppose, be deemed a precedent justifying the inference that a State disbursing, or distributing, officer must, at his peril, decide a controversy between rival claimants to a public office. This I say because the doctrine of the prevailing opinions on former appeals is that Peelle did not have, and could not have, any title to the office; and upon these decisions the auditor of State could have acted without incurring any risk, inasmuch as the entire controversy as to the right to the office concerned matters of law and not of fact. In saying this I do not mean to be understood as receding from the opinions heretofore expressed upon the principal question, for I here simply yield to the doctrine declared by the court in its former decisions.

Filed June 18, 1891.

No. 16,130.

HEILMAN ET AL. v. HEILMAN.

WILL.—Construction.—Nature of Estate.—A testator, after making specific devises to his children, bequeathed the rest of his property to his wife for life, and provided that after her death all his estate should be divided in equal shares among all his children, and that should any of his children be dead, and have left children, they should be entitled to the distributive share of their parents.

Held, that the children of the testator took a vested interest in the resi-

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due of his estate at the time of the death of the testator, the enjoyment of the same to be postponed during the life-estate of the wife.

SAME.—*Vesting of Estates.*—The law favors the vesting of estates and will construe the terms of a will as creating a vested estate, if possible.

SAME.—*Realty and Personality.*—Where the same clause of a will operates on both real and personal property, if the bequest of real estate vests, the same construction will be applied to the personal estate.

SAME.—*Vested and Contingent Remainders.*—Where a life-estate is given to the widow by will, the fact that the will gives to the widow the unrestricted use of the personal property during life, and, with others, a power of disposition of the real estate, thus making it uncertain what property will remain to distribute at her death to the remainderman, does not render the remainder contingent.

SAME.—Where there is no other gift contained in the will than the direction to pay, distribute or divide the estate in the future, yet, if such payment, distribution or division appear to be postponed for the convenience of the estate, fund or property, which embraces a life-estate to another, the estate will be vested and not contingent.

From the Vanderburgh Circuit Court.

C. A. De Bruler, for appellants.

J. E. Iglehart and *E. Taylor*, for appellee.

MILLER, J.—This action involves a construction of the seventh clause of the will of William Heilman, deceased.

Several paragraphs of complaint and answer are contained in the record presenting the questions of its operation on real and personal property separately, but the construction we put upon the instrument renders it unnecessary to set out or further describe the pleadings.

The will is as follows:

“I, William Heilman, of Evansville, Vanderburgh county, Indiana, of sound mind and memory, do hereby make and publish my last will and testament, hereby revoking all other wills and testaments heretofore by me made:

“*First.* I desire that all my just debts be paid out of my estate in the following manner: That all my outstanding accounts and claims, and notes held by me at the time of my death, be first used in discharging said debts.

“*Second.* I give and bequeath to my son George P. Heil-

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man \$10,000, in Louisville, Evansville and St. Louis consolidated 5 per cent. railroad bonds. Should I have parted or sold all said bonds, he is to have the market value in cash for said ten thousand bonds, whatever that may be, at the time of my death.

Third. I bequeath to my son William Heilman one thousand shares (\$50,000) of the capital stock in the Heilman Machine Works.

Fourth. I bequeath to my son Frederick Carl Heilman twelve hundred shares (\$60,000) of the capital stock of the Heilman Machine Works.

Fifth. I bequeath and direct that my daughter, Mary Heilman Rosencranz, shall have lot nineteen (19), and the adjoining forty-six and one-quarter ($46\frac{1}{4}$) feet of lot twenty (20) in the lower enlargement to the city of Evansville, with all the improvements thereon, for which she shall be charged \$22,000 on her share of my estate.

Sixth. To my dear wife, Mary Jenner Heilman, I give and bequeath all the rest of my property, real and personal, to be had and held by her during her natural life, and so long as she remains my unmarried widow. Should my said wife marry again, then she shall receive from my estate the amount and portion allowed her by law, and no more.

Seventh. After the death of my dear wife all my estate, excepting the bequests herein made, shall be divided in equal shares among all my children, and should any of my children be dead, and have left children, then they shall be entitled to the distributive share of their parents.

Eighth. Should, at any time after my death, my executor, or executrix, find that it will be to the best interest of my estate that any part of real estate thereto belonging be sold, then my wife, Mary J. Heilman, together with my sons George P. Heilman and William A. Heilman, jointly, shall have the right to sell my real estate belonging to my estate, and by their deed shall have the right to sell and convey the title in fee simple of such real estate.

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"*Ninth.* I hereby nominate and appoint my wife, Mary J. Heilman, executrix, without bond, of this my last will and testament."

The appellants, who are the children of George P. Heilman, who is a living son, and one of the residuary legatees of the testator, claim that the remainder limited upon the life-estate of the widow is a contingent one, which, upon the termination of the life-estate, will vest in such children of such testator as may be then living, and the children of any child who may have died after the death of the testator, and before the termination of the life-estate. The appellee, who, since the death of the testator, has purchased specific portions of the legacy of George P. Heilman, contends that the legacy to him became vested at the death of the testator, and asks that her title to the same be quieted as against his children.

If the interest of George P. Heilman in the residuum was a vested one, he had a right to sell and transfer it to the appellee, and vest in her a good title to the same. *Bunnell v. Bunnell*, 73 Ind. 163; *Fay v. Sylvester*, 2 Gray, 171.

We do not think it necessary to examine the distinction to be found in the books between the rules of construction of wills relating to personal property and those where real estate alone is concerned. It may well be doubted whether such distinction longer exists in this State, the paramount object in either case being to arrive at, as far as possible, the intention of the testator. In referring to a similar distinction claimed, this court, in *Holbrook v. McCleary*, 79 Ind. 167, says: "It is certain, we think, that the reason thus given for the supposed distinction has long since ceased to exist, if it ever existed, in this State. Here, the testator's will of personal estate must be executed with precisely the same solemnity and formality as the will devising real estate; and there is no perceptible or practical difference in the operation of a will upon personal estate and upon real estate."

In any event, inasmuch as the same clause of the will

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operates on both real and personal property, if the bequest of real estate vests, the same construction will be applied to the personal estate. 2 Redfield Wills, 244; 2 Jarman Wills, 479 *n. g.*; *Jull v. Jacobs*, L. R. 3 Ch. Div. 703; *Farmer v. Francis*, 2 S. & St. 505; *Tapscott v. Newcombe*, 6 Jur. 755; *James v. Lord Wynford*, 1 Sm. & Gif. 40.

The devise to the widow, contained in the sixth clause of the will, gives to her a life-estate in all the property of the testator not specifically devised. By the seventh clause the ulterior interest in the property, upon the determination of the intervening estate, is given to or divided among his children, but should any of his children be dead leaving children, they are to take the distributive share of the parent.

The distinction between vested and contingent estates is thus given in 2 Redfield Wills, 218, 6: "From a careful examination of this subject, it will be found, we think, that the question of vesting, or remaining contingent, depends upon whether the condition of the intervening estate determining, and the estate over taking effect, is one that must happen some time, and so as to give effect at some period to the second estate, or may never happen. If the former, then the second estate in remainder will always be regarded as vested. But in every case where the *existence* of the secondary estate is made dependent upon a contingency which may never happen, or never happen so as to allow of the vesting of the secondary estate, then the devise or bequest must be regarded as contingent, as well in its character as in regard to the time when it will come into operation."

The law favors the vesting of estates and will construe the terms of a will as creating a vested estate, if possible. *Harris v. Carpenter*, 109 Ind. 540. In *Amos v. Amos*, 117 Ind. 37, it is said: "We affirm, as an established principle, that the law not only favors the vesting of remainders, but it also presumes that words postponing the estate relate to the beginning of the enjoyment of the remainder, and not

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to the vesting of that estate. *Davidson v. Koehler*, 76 Ind. 398; *Davidson v. Bates*, 111 Ind. 391; *Davidson v. Hutchins*, 112 Ind. 322."

In *Bruce v. Bissell*, 119 Ind. 525, this language is used: "It is familiar law that, in the absence of a clear manifestation of the intention of the testator to the contrary, estates shall be held to vest at the earliest possible period. The intent to postpone the vesting of the estate must be clear and manifest, and must not arise by mere inference or construction. It is likewise well settled that 'The law will not construe a limitation in a will into an executory devise when it can take effect as a remainder, nor a remainder to be contingent when it can be taken to be vested.' *Doe v. Considine*, 6 Wall. 458 (475); *Amos v. Amos*, 117 Ind. 19; *Amos v. Amos*, 117 Ind. 37; *Harris v. Carpenter*, 109 Ind. 540; *Hoover v. Hoover*, 116 Ind. 498, and cases cited.

"An estate in remainder is not rendered contingent by the uncertainty of the time of enjoyment. The right and capacity of the remainderman to take possession of the estate, if the possession were to become vacant, and the certainty that the event, upon which the vacancy depends, must happen some time, and not the certainty that it will happen in the lifetime of the remainderman, determines whether or not the estate is vested or contingent.'"

A will takes effect and speaks from the time of the death of a testator, and survivorship often referred to and made a condition, turning point, or controlling event in the disposition of property by a will, generally, in the absence of an expressed or implied intention to the contrary, will be construed to refer to the time of the death of the testator. *Harris v. Carpenter*, *supra*.

In the light of these authorities we have arrived at the conclusion that the children of the testator took a vested interest in the residue of his estate at the time of the death of the testator, the enjoyment of the same to be postponed during the life-estate of the appellee. We are fortified in

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this opinion by the result arrived at in the case of *Livingston v. Greene*, 52 N. Y. 118, in the construction of a will similar in all essential points, except that in that will the children are mentioned by name.

It is strongly contended by the appellants that the general rules in favor of the vesting of estates do not apply to this case, because of some special provisions that bring it within the exceptions to the general rules.

One of these is that the will gives to the widow the unrestricted use of the personal property during life, and, with others, a power of disposition of the real estate, thus making it uncertain what property would remain to distribute at her death.

This, of course, could only be considered as a circumstance bearing upon the intent of the testator, for it is not the uncertainty as to the, *quantum* or condition of the estate, but uncertainty as to the persons to take, that would render the estate contingent. Neither the sale of the real estate and its conversion into personalty, nor its use, would prevent the estates of his children from vesting at the death of the testator. *Rumsey v. Durham*, 5 Ind. 71; *Bowen v. Swander*, 121 Ind. 164.

We are unable to draw any inferences from these circumstances of an intention to postpone the vesting of the legacies until the death of his widow.

The position is also taken, and authorities cited to sustain it, that, inasmuch as the will contains no language of gift to the children, but simply a direction after the death of the widow to divide the estate, it shows that the testator intended the period of distribution was to be not simply the time fixed for the enjoyment of the possession, but for the vesting of the estate itself.

We have examined the cases cited by the appellant upon this point, and find that, while the doctrine is well established, the courts are much more disposed to admit it as

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a rule of law than to follow the rule. We do not consider it necessary in this case, for reasons that will presently be stated, to enter at length into a discussion of the limitations of this rule to be found in a multitude of cases. We do not consider the rule referred to as being a fixed and unbending rule for determining the vested or contingent quality of estates; on the contrary, in the late case of *Reed's Appeal*, 118 Pa. St. 215, the court says: "The gift of a legacy under the form of a direction to pay at a future time, or upon a future event, is not less favorable to vesting than a simple and direct bequest of a legacy at a like future time or upon a like event. The question is one of substance and not of form, and in all cases it is whether the testator intended it as a condition precedent that the legatees should survive the time appointed by him for the payment of their legacies; and the answer to this question must be sought for out of the whole will, and not in the particular expression in which the gift is made. *Leeming v. Sherratt*, 2 Hare, 14." If this has become a rule of property so as to require this court to follow it as a technical rule of construction, which we do not decide, it can not affect the vesting of the estate in the children of the testator at his death, because of exceptions to the rule itself.

One of these exceptions is, that where there is no other gift contained in the will than the direction to pay, distribute or divide the estate in the future, yet, if such payment, distribution or division appear to be postponed for the convenience of the estate, fund or property, which embraces a life-estate to another, the estate will be vested and not contingent. 2 Redfield Wills, 237, 37; 2 Williams Executors, 1344; 2 Jarman Wills, 450; *King v. Isaacson*, 1 Sm. & G. 371; *Smith v. Palmer*, 7 Hare, 224.

The reference to the grandchildren is one usually inserted in wills, intended originally to prevent the lapsing of legacies, but since the enactment of our statute, sections 2567 and 2571, R. S. 1881, seldom necessary. We do not regard

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the insertion of this provision as of controlling effect in the construction of the instrument. The will under consideration, as we construe it, shows that the testator intended to bestow his whole estate upon his children, and that after making the specific legacies, he carved out of the remainder a life-estate for the benefit of the widow; in other words, that the enjoyment of the estate by the legatees was simply postponed to let in the life-estate.

While there are no general words of gift, except the provision to divide the estate, contained in the seventh clause, we take it that the statement in the fifth clause that the realty devised to Mrs. Rosencranz should be charged at a specific sum, "on *her share* of my estate," is some indication that she was individually and certainly to have a share of the residuum of his estate. This view is strengthened by the language used in the seventh clause, which gives to the children, not as a class, but to each one, a distinct title to his or her own share, which, in the case of Mrs. Rosencranz, it is expressly provided, is to be ascertained by deducting the value of her specific devise from her *pro rata* share.

As has been observed, the law favors the vesting of estates, and courts will so hold, unless there is something in the instrument showing clearly a contrary intention.

We find nothing in the language in this instrument to take it out of the general rule.

We find no error in the record, and, therefore, the judgment is affirmed.

Filed Sept. 15, 1891.

Hyland, Auditor, *et al.* v. The Central Iron and Steel Company.

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No. 15,430.

HYLAND, AUDITOR, ET AL. v. THE CENTRAL IRON AND STEEL COMPANY.

TAXES.—*Collection of.*—*Injunction.*—*Tender.*—Where property is subject to taxation, the collection of the tax can not be enjoined without paying or tendering the amount for which the property is liable, although part of the amount levied may be illegal.

SAME.—*Corporation.*—*Assessment upon Capital Stock.*—Where the tangible property of a corporation is of less value than the capital stock, the capital stock is taxable to the extent that it exceeds in value the tangible property. *Hyland v. Brazil, etc., Co.*, 128 Ind. 335, distinguished.

From the Clay Circuit Court.

W. B. Schwartz, J. A. McNutt and H. Teter, for appellants.

G. A. Knight and A. W. Knight, for appellee.

ELLIOTT, J.—The facts in this case are similar to those presented by the record in *Hyland v. Brazil, etc., Co.*, 128 Ind. 335, but there is one material fact presented by the record now before us which was not presented by the record in the case cited. Many of the questions presented here were decided in the case to which we have referred, and it is unnecessary to again discuss those questions in detail, but it is perhaps proper to speak very briefly of one of them. It was not decided in the case of *Hyland v. Brazil, etc., Co.*, *supra*, that a taxpayer might enjoin the collection of taxes where his property was subject to taxation, although part of the taxes are illegal, without tendering the part for which his property is liable; on the contrary, it was expressly declared that where the property is subject to taxation, the collection of the tax can not be enjoined without paying or tendering the amount for which the property is liable, although part of the amount levied may be illegal. The cases of *Logansport v. Case*, 124 Ind. 254, and *Morrison v. Jacoby*, 114 Ind. 84, were there fully approved, and so they are here. What

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was decided in *Hyland v. Brazil, etc., Co., supra*, is, that where the property is not subject to taxation at all, and there is no jurisdiction to levy any part of the tax assessed on that particular property, no tender is necessary. There was no departure from the long and firmly settled doctrine that where the property is subject to taxation, but is irregularly assessed, or assessed beyond its value, a tender of the amount for which the property is liable, is always indispensable.

The fact which we have said appears in this record, but was not contained in the record in *Hyland v. Brazil, etc., Co., supra*, is this: The schedule made out and verified by the appellee contains these statements:

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| Actual value of stock | \$150,000 |
| Total value of indebtedness, except the indebtedness for the current expenses, excluding from such expense the amount paid for the purchase and improvement of property | 284,761 |
| Assessed value of lands | 7,485 |
| Assessed value of personal property | 27,830 |
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| Total assessed valuation of all tangible property of said company | \$35,315 |

It thus appears, from the appellee's return of property for taxation, that the tangible property is of less value than the capital stock, inasmuch as the actual value of the capital stock is one hundred and fifty thousand dollars, while the tangible property is of the value of thirty-five thousand three hundred and fifteen dollars. This fact clearly and decisively discriminates the present case from *Hyland v. Brazil, etc., Co., supra*, insomuch as in that case, according to the confessed allegations of the complaint, the entire capital stock was invested in and represented by the tangible property returned for taxation. We there said that "The question whether an assessment may be levied upon capital stock to the extent to which it exceeds in value the tangible property is not presented by the complaint, nor is the ques-

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tion whether corporate franchises may be taxed where they have a value over and above the tangible property and the capital stock, presented for our decision." The question which we declared not then before us is now presented.

It seems quite clear that no taxpayer can be twice taxed upon the same property, and so the authorities declare. *State v. Hannibal etc., Co.*, 37 Mo. 265; *Burke v. Ballam*, 57 Cal. 594; *State v. Cumberland*, 40 Md. 22; Cooley Taxation, 225. Where the property once pays its full share of taxes to the State or county, it can not be subjected to a greater burden for the same purposes, although it may be subjected to special taxes in the form of assessment for local improvements or to municipal corporation taxes in common with other property. Where there is an attempt to doubly tax property, there is a violation of law. Our statute provides that "In all cases where the tangible property or the capital stock of any incorporated company is listed and assessed under this act, the shares of capital stock of such incorporated company shall not be listed and assessed." Sections 6305-6308, R. S. 1881. This provision was intended to prohibit double taxation, and it enforces the principle stated by us.

We can not, however, hold that the provision quoted is to be considered apart from other provisions of the statute, and construed as prohibiting the taxation of capital stock in all cases; on the contrary, we hold, as was held in *Hyland v. Brazil, etc., Co.*, *supra*, that it is to be considered in connection with other provisions of the statute, and that when so considered it does not exclude the taxation of capital stock where it is not invested in, and fully represented by, tangible property subject to taxation. If the capital stock exceeds in value the tangible property subject to taxation, and assessed for taxation, then to the extent of its value in excess of the value of the tangible property it may be listed and assessed, for it is apparent that in such a case there is not double taxation. It can not be assumed that the tangible property

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necessarily represents the value of the capital stock, for the business of a corporation owning comparatively little tangible property may be so profitable as to impress upon its stock a value much beyond its tangible property; or it may be the owner of a franchise which gives the stock a value much greater than that of the tangible property of which it is the owner. A corporation which, in its sworn return, values its capital stock at almost five times as much as its tangible property, can not successfully assert that the taxation of its tangible property entirely absolves its capital stock from liability. It is, at all events, entirely clear that where it affirmatively appears, as it does from the evidence in this case, that the tangible property is not equal to the value of the stock, the stock is taxable to the extent that it exceeds in value the tangible property.

The only evidence as to the value of the capital stock, as well as the only evidence of the value of the tangible property, was that contained in the tax-list, or schedule, and that certainly does not prove, or tend to prove, that there was double taxation, since the actual value of the capital stock is shown to exceed that of the tangible property more than one hundred thousand dollars.

The record affirmatively shows that there was authority in the board of equalization to act upon the list returned by the appellee, for there was such a list placed before it, and the statute vests it with jurisdiction over the subject. Sections 6305, 6308, 6357-6359, R. S. 1881; *Hyland v. Brazil, etc., Co., supra*. The list showed that the capital stock was subject to taxation to the extent that it exceeded in value the tangible property, so that there was not, as in *Hyland v. Brazil, etc., Co., supra*, an attempt to subject property to taxation which was not taxable. Here there was jurisdiction, for here there was a list placed before the board of equalization, as the law requires. That list disclosed property subject to taxation, and on that property—the capital stock—the statute expressly makes it the duty of

Harris v. Howe.

the board to place a value. It may well be doubted whether the courts can interfere at all in such a case as this, for the rule supported by the weight of authority is, that where there is jurisdiction and no principle of law is violated, the valuation of the board of equalization is conclusive. *Cooley Taxation*, 747-748; *Small v. City of Lawrenceburgh*, 128 Ind. 231; *Board, etc., v. Senn*, 117 Ind. 410. There is here no evidence that the valuation of the board was erroneous, and, certainly, no reason for setting it aside, even if the courts had power to do so. If the board had placed a much greater value upon the capital stock than that fixed by the appellee in the schedule, its action could not, under the rule referred to, be disturbed unless it was made to appear that some principle of law was violated. But the board did not increase the valuation; on the contrary, it placed the value of the capital stock at \$60,000, and from this deducted the value of the tangible property, \$27,830, thus leaving subject to taxation \$32,170 as the value of the capital stock.

The trial court erred in finding for the appellee upon the evidence adduced, for upon that evidence the law is with the appellants.

Judgment reversed, with instructions to award a new trial.

COFFEY, C. J., did not take any part in the decision of this case.

Filed Sept. 15, 1891.

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| 133 | 164 |
| 129 | 72 |
| 135 | 230 |

No. 14,505.

HARRIS v. HOWE.

APPELLATE COURT.—*Proceedings Supplementary to Execution.—Jurisdiction.*

—The Appellate Court has exclusive jurisdiction of a proceeding supplementary to execution, in aid of the collection of a judgment, where the amount in controversy does not exceed one thousand dollars. The fact that it may be necessary for the court to pass upon the validity of

The Parke County Coal Co. v. The Terre Haute Paper Co. *et al.*

a transfer of property, where it incidentally arises, is not sufficient to deprive the Appellate Court of jurisdiction.

From the Bartholomew Circuit Court.

S. Stansifer and *C. S. Baker*, for appellant.

J. C. Orr and *W. S. Swengel*, for appellee.

MILLER, J.—This was a proceeding supplementary to execution, instituted under section 819, R. S. 1881, in aid of the collection of a judgment.

We are of the opinion that the cause is within the exclusive jurisdiction of the Appellate Court. The action is "for the recovery of money only," and the amount in controversy is less than one thousand dollars. We do not think that the fact that it may be necessary for the court to pass upon the validity of a transfer of property, where it incidentally arises, is sufficient to deprive the Appellate Court of jurisdiction. *Baker v. Groves*, 126 Ind. 593; *Parker v. Indianapolis Nat'l Bank*, 126 Ind. 595.

The clerk of this court is, therefore, directed to transfer this cause to the Appellate Court for final determination.

Filed May 16, 1891.

No. 14,546.

THE PARKE COUNTY COAL COMPANY v. THE TERRE
HAUTE PAPER COMPANY ET AL.

SPECIAL FINDING.—*Silence Upon a Material Fact.*—When a finding is silent upon a fact material to be found, it is to be taken as found against the party having the burden of proving such fact.

CORPORATION.—*Transfer of Stock — Rights of Creditors.*—The stockholders of a corporation transferred their paid-up stock and the corporate property to the president thereof, who executed a mortgage on the property to secure the purchase-price of the stock and borrowed money, agreeing also to pay all debts and liabilities of the corporation. The mortgage

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| 143 | 557 |
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| 146 | 552 |
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The Parke County Coal Co. v. The Terre Haute Paper Co. *et al.*

and the deed to the property were recorded. Stockholders, with knowledge of the transfer, were also stockholders of another corporation, and to the latter corporation the former became indebted for goods furnished after the deed and mortgage were placed on record.

Held, that the record of the deed and mortgage was constructive notice to the creditor corporation, and that it was not entitled to have the deed and mortgage set aside for fraud.

SAME.—Withdrawal of Stock.—Statute.—A transfer of paid-up stock and the property of a corporation by some of the stockholders to another stockholder, who assumes all liabilities and executes a mortgage on the property to secure the purchase-price of the stock, is not, in effect, a withdrawal of the capital stock from the corporation. Section 3858, R. S. 1881, authorizes the transfer of stock of a corporation when paid in, the transfer to be made in such manner as the by-laws of the corporation may prescribe. In the absence of a showing to the contrary, the transfer will be presumed to have been made in accordance with the by-laws.

From the Vigo Circuit Court.

S. B. Davis, C. F. McNutt, J. G. McNutt and F. A. McNutt, for appellant.

B. V. Marshall and J. G. Williams, for appellees.

OLDS, C. J.—In the complaint, consisting of one paragraph, it is alleged that on the 9th day of November, 1883, the defendants Close, Fairbanks, Quinlan, Duncan, Hervey, Close, Jr., McKeen and Hulman, filed articles of association for the Terre Haute Paper Company, whereby the defendant the Terre Haute Paper Company became a body corporate; that afterward the defendant McKeen became the owner by assignment of all the stock and interest of Hervey, and succeeded to all the rights of Hervey; that said corporation began business, and plaintiff sold to it, from the time of its organization to August 13th, 1886, a large amount of coal, which was used by said company in the manufacture of paper; that on the 13th day of August, 1886, plaintiff settled its accounts with the Terre Haute Paper Company, and there was a balance due the plaintiff, on account, at that date, and said company executed to plaintiff four promissory notes for said balance, one for \$507.84, due at one week from

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date; one for \$500, due in thirty days from date; one for \$500, due at sixty days from date, and one for \$1,000, due at ninety days from date, all with eight per cent. interest, and ten per cent. attorney's fees, and all negotiable and payable at the bank of McKeen & Co., Terre Haute, Indiana; that the first two of said notes are due and unpaid; copies of all are filed with the complaint. It is further averred that on the 10th day of September, 1885, the members of said corporation fraudulently, and to cheat, hinder and delay the creditors of said corporation, and wholly without consideration, paid and conveyed their stock and the property of said corporation to the defendant Manley T. Close, who was president of said corporation, and transacted all its business, for its organization, with plaintiff; that said Manley T. Close, and Harriet H. Close, his wife, mortgaged all of said corporate property to defendant Demas Deming, as a trustee, to secure the payment of notes executed by said Manley T. Close, to each of said stockholders for their several shares of stock, in the sum of \$25,000; that at the same time said Manley T. Close and wife executed to defendant Herman Hulman a mortgage, as trustee, upon said corporate property to secure notes made by said Close to others of said stockholders, in the sum of \$10,000; that said Close was president of said corporation, and conducted the business of said company, and carried on the same in the name of said corporation, with full knowledge and consent of said stockholders, and purchased stock and material of plaintiff, and others, in the name of said corporation, and signed the notes of plaintiff as the notes of said corporation; that defendant corporation made no provision for the payment of the debts of said concern, and plaintiff had no notice or knowledge of such transfer at the date of her said notes, and said corporation was never dissolved.

It is further averred that said Close abandoned said property, and said stockholders and trustees seized the same, and have converted the same to their own use, and, for the pur-

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pose of defrauding and cheating plaintiff and other creditors, have organized the defendant Ellsworth Paper Company, and have caused conveyances to be made from defendants Close and wife of all the real estate and assignments of choses, claims and personal property belonging to said Terre Haute Paper Company to said Ellsworth Paper Company.

It is further averred that all of said defendants were stockholders in the defendant corporation, the Terre Haute Paper Company, at the time of the execution of the aforesaid mortgages to Deming and Hulman, and there was no other consideration for the debts secured by said mortgages than the shares of stock of said several defendants; that said mortgages were and are fraudulent and void as against the creditors of said corporation and said Close, and were made to prevent the collection out of said corporation property of the debts of said corporation and Close, contracted as aforesaid in the name of said corporation, and with the full knowledge of the said stockholders and their trustees aforesaid, and the property, to wit, coal sold by plaintiff to said company, was so sold to and bought by its officers to be and was consumed in the operation and running of the paper mill of the defendant corporation in the regular line and execution of its business. Prayer for judgment upon the notes for \$5,000, that said mortgages and conveyances to Ellsworth Paper Company be declared void and inoperative as against plaintiff, and that plaintiff's claim be declared a lien for supplies superior to any claim of defendants, or any of them, and that the property be subjected to sale for the payment of the plaintiff's claim.

The action was dismissed as to Harriet Close, wife of Manley T. Close, Manley T. Close, Jr., and James K. Kendall. The Terre Haute Paper Company was defaulted.

The Ellsworth Paper Company and Manley T. Close each filed separate answers in denial; all of the other defendants joined in an answer in denial.

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The cause was submitted to the court for trial without the intervention of a jury.

The facts found by the court are, substantially, as follows :

The plaintiff, the Terre Haute Paper Company, and the Ellsworth Paper Company are corporations organized under the laws of the State of Indiana, the Ellsworth Paper Company being incorporated September 11th, 1886, and the Terre Haute Paper Company November 9th, 1883. The names of the persons signing the articles of incorporation of each of these companies are given.

The capital stock of the Terre Haute Paper Company was \$75,000, and was fully paid up, Manley T. Close taking and paying for \$50,000 of the stock, and the defendants William R. McKeen, Frank McKeen, Herman Hulman, Demas Deming, Crawford Fairbanks, James R. Duncan, Manley T. Close, Jr., and Michael Quinlan paying for the remainder of said stock the sum of \$25,000 in cash, and owning the same respectively in certain proportions.

At a meeting of all the stockholders of the Terre Haute Paper Company held September 5th, 1885, it was unanimously resolved to sell and convey the entire property of the company to defendant Manley T. Close for \$75,000, he agreeing to pay \$50,000 in cash, and to execute his notes to the said defendants William R. McKeen, Frank McKeen, Herman Hulman, Fairbanks, Deming, Duncan and Quinlan, for certain amounts respectively, stated in the finding, and securing the payment of the same by a mortgage executed by Manley T. Close and Harriet H. Close, his wife, to Demas Deming as trustee for the benefit of the payees of such note upon all the property to be conveyed by the paper company to Manley T. Close as aforesaid, he also assuming and agreeing to pay all the debts and liabilities of the said paper company as part consideration for the conveyance of said property.

The board of directors were authorized and directed by this stockholders' meeting to carry into effect the sale and

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conveyance to Close of the property aforesaid upon the terms and conditions aforesaid, and to cause to be executed and delivered the necessary deed and papers for that purpose. At a full meeting of the board of directors of the company, held on September 5th, 1885, the proceedings of the stockholders' meeting were presented, and it was unanimously resolved by the board that the president and secretary of the company execute and deliver a deed and such other papers as might be necessary to transfer to Manley T. Close the entire property of the company upon the terms and conditions set forth in the proceedings of the stockholders' meeting aforesaid.

On September 10th, 1885, the Terre Haute Paper Company, by its president and secretary, conveyed by deed to said Manley T. Close the real property of the company, with the buildings and machinery thereon situate, known as the Terre Haute Paper Mill, which deed was recorded in the recorder's office of Vigo county, State of Indiana, September 18th, 1885, in deed record 68, on page 90; and also on the same day Manley T. Close and Harriet H. Close, his wife, executed and delivered to Demas Deming, as trustee, a mortgage upon the property conveyed to said Manley T. Close, as aforesaid, to secure the payment of certain notes then executed by him to the defendants herein, as required by the resolutions of the stockholders and board of directors of the Terre Haute Paper Company hereinbefore set forth, which mortgage was duly recorded in the recorder's office of Vigo county, Indiana, on the 15th day of September, 1885, in mortgage record E 1, at page 460.

Manley T. Close and Harriet, his wife, on September 10th, 1885, mortgaged the property conveyed to him, as aforesaid, by the paper company, to defendant Herman Hulman, as trustee, to secure the payment of \$10,000 then loaned and advanced in cash to said Manley T. Close in certain proportions by some of the defendants herein respectively, which mortgage was recorded in the recorder's office of said county

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of Vigo, September 15th, 1885, in mortgage record E 1, page 462.

The debts secured by the two mortgages last above mentioned have never been paid, and the mortgages remain unsatisfied.

On September 10th, 1885, defendants William R. McKeen, Frank McKeen, Hulman, Deming, Fairbanks, Duncan and Quinlan, being then the owners of the paid up capital stock of the Terre Haute Paper Company to the amount of \$25,000, transferred and assigned all their said stock to Manley T. Close, and he, from that date until the 20th of August, 1886, carried on, in the name of the Terre Haute Paper Company, the business which, prior to that time, had been carried on by that company, and during said period continued to keep the position of president of the Terre Haute Paper Company, which he had filled from the organization of the company, to wit, from December 11th, 1883.

During all the time the Terre Haute Paper Company was carrying on business the plaintiff sold coal to it, and in February, 1886, plaintiff received payment in full of all claims against that company up to March 1st, 1886. Between this last-named date and June 1st, 1886, plaintiff sold and delivered from time to time coal at the works of the said paper company, and for the amount due for such coal remaining unpaid on the 13th day of August, 1886, the plaintiff took from Mauley T. Close in payment for the amount then due four several notes, copies of which are set forth in the complaint.

When the Terre Haute Paper Company authorized and directed the sale of its property to Close, the defendants William R. McKeen, Deming and Collett, were respectively holders and owners of shares of the capital stock of the Parke County Coal Company, plaintiff herein, and of the Terre Haute Paper Company, defendant herein, and each and all of them had full knowledge of the transfer and conveyance which was then made by the Terre Haute Paper

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Company of its property to Manley T. Close, and acquiesced therein and consented thereto.

James R. Kendall, who was one of the incorporators of the Ellsworth Paper Company, is, and for more than five years past has been, the president of the Parke County Coal Company, plaintiff herein.

Manley T. Close owed the First National Bank of Terre Haute between \$11,000 and \$12,000, and about August 23d, 1886, he and his wife conveyed by deed in proper form to Henry S. Deming in consideration of about \$2,000, the property conveyed to him by the said Terre Haute Paper Company, which property was and always had been situate in Vigo county in the State of Indiana.

Defendants William R. McKeen, Hulman, Duncan, Close, and Quinlan, have not now, and never have had, any interest whatever in the Ellsworth Paper Company.

In September, 1886, Henry S. Deming conveyed to defendant Ellsworth Paper Company all the property acquired by him under the conveyance to him from Close, which property at that time was worth about \$40,000, and at the time Close purchased it was worth about \$50,000.

Joseph Martin, as superintendent of the plaintiff herein during all the time when coal was being sold to the Terre Haute Paper Company, had control of the property and the business of the plaintiff, and sold the coal to the paper company. When he sold the coal for which the notes in suit were executed, he had no actual personal notice of any transfer of the paper company's property to Close, or of any change of ownership of the stock or property thereof.

The four notes mentioned in the complaint are wholly unpaid, and there is now due upon them the sum of \$2,768.50.

The conclusions of law drawn by the court were that the plaintiff ought to recover the sum of \$2,760.50 from the Terre Haute Paper Company, and as to the other defendants there ought to be a finding in their favor.

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A new trial was granted as against the Terre Haute Paper Company, and afterwards a finding and judgment against it for \$3,130.16.

The questions presented involve the plaintiff's rights against the other defendants.

From the finding of facts it will be seen that the stockholders, other than Manley T. Close, owning \$25,000 of stock, sold their stock to said Close, and he executed a mortgage on the property of the corporation to secure the purchase-price of the stock to be paid by him, also assuming and agreeing to pay all the debts and liabilities of the company.

Close and wife executed another mortgage to secure the payment of \$10,000, borrowed money.

The findings of fact also show that the debt due the appellant is for coal furnished after the sale of the other stockholders of their stock to Close.

There is no fraud found to exist. The transaction appears to have been a fair one. The stockholders selling out made provision for the payment of all debts of the corporation, and the debt then due to the appellant was paid. McKeen Deming and Collett were, respectively, holders and owners of stock in the appellant company and the Terre Haute Paper Company, and had full knowledge of the transfer and conveyance to Close. Kendall, who was one of the incorporators of the Ellsworth Paper Company, is, and for five years past has been, the president of the appellant coal company. The officers of the appellant were bound to take notice of the mortgages, which were duly recorded. The record was constructive notice to the appellant company. The complaint is to set aside the mortgages and conveyances for fraud. The burden is upon the appellant to prove fraud. There is no fraud found to exist. The findings being silent on the subject of fraud, the conclusion follows that none exists, and that none was proven. The rule is that when a finding is silent upon a fact material to be found, it is to be taken as

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found against the party having the burden of proving such fact.

The questions presented by the record are, whether or not the court erred in its conclusions of law, and whether the finding is supported by the evidence. We do not think the court erred in its conclusions, and there is evidence to support the finding.

Section 3859, R. S. 1881, provides that the capital stock, as fixed by the articles of the incorporation, "shall be paid into the treasury thereof, within eighteen months from the incorporation of the same, in such instalments as the by-laws of the company assess and direct." Counsel for appellant earnestly contend that, as the capital stock in the paper company was paid into the treasury in money, or its equivalent, it must remain in the treasury of such company for the benefit of creditors, and it can not be withdrawn by the members of the corporation; that the sale of the stock by the other stockholders to Close was, in effect, a withdrawal of the capital stock from the corporation, and therefore the transaction transferring the stock and property of the corporation to Close was void. We can not agree with this theory of counsel. Section 3858, R. S. 1881, authorizes the transfer of stock of a corporation, when paid in, the transfer to be made in such manner as the by-laws of the corporation may prescribe. There is nothing to show that the transfer of the stock and property of the corporation to Close was not made in accordance with the by-laws of the corporation. It further appears by the finding that the transaction was made in good faith. The property of the corporation was conveyed by deed, and mortgages were executed in payment for the stock, and to secure other creditors of the corporation, and such deed and mortgages were placed on record prior to the time the debt due the appellant was contracted.

There is no error in the record.

Judgment affirmed, with costs.

Filed March 14, 1891; petition for a rehearing overruled June 19, 1891.

 White v. McGrew.

No. 15,127.

WHITE v. MCGREW.

DRAINAGE.—Ditch Assessment.—Delinquency.—The assessment for the construction of a ditch, under sections 4285–4317, R. S. 1881, becomes due upon the acceptance of the work by the surveyor, and where the certificate of acceptance is filed with the auditor in August, the assessment becomes delinquent if not paid on or before the first Monday of November, and the land may be sold. *Cullen v. Straus*, 124 Ind. 340, followed.

NEW TRIAL.—Excessive Damages.—The fourth cause for a new trial, viz., “Excessive damages,” is proper only in cases of torts.

From the Huntington Circuit Court.

H. B. Sayler, S. M. Sayler and J. M. Sayler, for appellant.

J. B. Kenner and J. I. Dille, for appellee.

COFFEY, C. J.—Prior to the 29th day of August, 1883, a ditch was established and constructed over the land in controversy in this suit, under the provisions of sections 4285–4317, R. S. 1881. On the 29th day of August, 1883, the surveyor of the county accepted the work as completed, and issued to the contractor his certificate of acceptance, calling for the sum of two hundred and fifty dollars and twenty cents, which certificate the contractor filed with the auditor. The assessment being unpaid, the land was sold for the payment thereof on the 22d day of March, 1884, by the county treasurer, and the appellee became the purchaser, bidding therefor the sum of two hundred and eighty-nine dollars and ninety cents. The appellant failing to redeem the land from such sale, the auditor executed to the appellee a deed for the same on the 4th day of May, 1886. This suit was instituted in the Huntington Circuit Court, by the appellee, to quiet his title to the land; and, finding that the sale was insufficient to convey title, the court found that there was due the appellee the sum of five hundred and twenty-three dollars and eighty-nine cents, declared the same a specific lien on the land, and, over a motion for a new trial, rendered judgment on such finding.

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White v. McGrew.

It is contended by the appellant that the assessment against his land did not become delinquent until after the third Monday in April, 1884, had passed, and that a sale made for the payment of such assessment on the 4th day of March was void, and conveyed to the appellee no rights.

The question here presented was decided adversely to the contention of the appellant in the case of *Cullen v. Strauz*, 124 Ind. 340.

The court did not err in admitting in evidence the deed executed by the auditor to the appellee.

It is also contended by the appellant that the court erred in the assessment of the damages, such assessment being too large.

The reason assigned for a new trial, in the written motion, was that the damages assessed by the court were excessive.

It is objected by the appellee that, as this is not an action sounding in tort, this reason for a new trial does not apply, and that no question is presented for our consideration.

This objection seems to be well taken. *McCormick, etc., Co. v. Gray*, 114 Ind. 340; *Moore v. State, ex rel.*, 114 Ind. 414; *Lake Erie, etc., R. W. Co. v. Acres*, 108 Ind. 548; *Thomas v. Merry*, 113 Ind. 83; *Clark Civil Township v. Brookshire*, 114 Ind. 437; *McKinney v. State, ex rel.*, 117 Ind. 26; *Smith v. State, ex rel.*, 117 Ind. 167; *Hogshead v. State, ex rel.*, 120 Ind. 327.

The reason assigned for a new trial in this case is applicable to actions sounding in tort, and has no application in an action like the one before us.

There is no error in the record.

Judgment affirmed.

Filed Sept. 16, 1891.

Crew *et al.* v. Dixon.

No. 14,338.

CREW ET AL. v. DIXON.

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| 147 | 393 |
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| 152 | 496 |

WILL.—Construction.—Life-Estate.—Power of Disposition.—Vested Remainder.—The will of the testator, after mentioning the disposition of certain property during his lifetime, devised to his wife all of his other property, to be held and used by her during her natural life. The will also provided, as to certain notes, that she was to collect the same, with the privilege to use so much thereof as she might deem necessary to carry on her business, etc. The will further provided: "But before her (the wife's) death, I desire her to provide by will, or otherwise, for a distribution of whatever of my estate may remain in her hands among her and my children in such manner as she in her judgment shall deem best and most equitable. Such distribution not to take effect until after her death."

Held, that when a will limits the estate of the first taker to life, the devisee can not take a fee, although he may be invested with a power to appoint those who shall take that estate.

Held, also, that under the will as to the personal property a right was vested in the widow to use such of it as she chose, and to distribute what remained at her death, at her pleasure, among the members of the class designated by the testator.

Held, also, that as to the real estate the fee was not in the widow at any time, and she could not devise the same, and that the remainder was vested in the heirs at the date of the testator's death.

SAME.—Disinheritance of Heir.—Ambiguity as to.—An heir can not be disinherited unless the intention to disinherit be expressed, or is to be clearly and necessarily implied. Where one construction of an ambiguous will leads to the disinheritance of the heir, and another to a result favorable to the heir, the latter construction must be adopted.

SAME.—The Word "Estate" In.—How Construed.—The word "estate" in a will may, if it is necessary to do so in order to carry out the intention of the testator, be construed to mean one species of property only. It does not always mean both real and personal property.

From the Clark Circuit Court.

J. K. Marsh and *A. Dowling*, for appellants.

G. H. D. Gibson, for appellee.

ELLIOTT, J.—Thomas Crew, through whom the parties claim title, was twice married. The appellants are his chil-

Crew et al. v. Dixon.

dren by his first marriage. His second wife was Elizabeth Dixon, who was a widow at the time of her marriage to him. The appellee, Eliza Dixon, is her child by her former marriage. Thomas Crew was the owner of personal and real property at the time of his death, and of it he made a testamentary disposition. His widow elected to take under his will. She executed a will wherein she devised to the appellants twenty-five dollars each, and to her daughter the real estate of which her husband, Thomas Crew, died seized.

The provisions of the will of Thomas Crew, so far as they are material to the controversy, are these: "I give, bequeath and devise to my said wife all of my other property of every kind, to be held and used by her during her natural life; the house and lot where I now live to be entirely under her control so long as she shall live, together with all the furniture in the same; and the notes that I may have, to be collected by her in her individual name as they may fall due; the principal of such notes to be held or invested by her as she may deem proper, with the privilege to her to use so much thereof as she may deem necessary to carry on her business or to furnish her a comfortable support. But before her death I desire her to provide by will, or otherwise, for a distribution of whatever of my estate may remain in her hands, among her and my children in such manner as she, in her judgment, shall deem best and most equitable; such distribution not to take effect until after her death."

Where a will limits the estate of the first taker to life, the devisee can not take a fee although he may be invested with a power to appoint those who shall take that estate. In the will before us the estate of the first taker is clearly limited to one for life, for the words employed in describing it expressly designate it as an estate for life, and the super-added words, "to be entirely under her control so long as she shall live," make it impossible to construe the will as devising her the fee. The fee descends to the heirs unless the

Crew *et al.* v. Dixon.

will either directly makes, or authorizes some one to make, such disposition of the property as breaks or interrupts the operation of the law. *Thomas v. Thomas*, 108 Ind. 576, and authorities cited. As the will under discussion does not expressly and directly dispose of the fee, the law must prevail, unless there is a power of appointment which interrupts its operation.

We are clear that the will does invest the first taker with a power of disposing of some of the property named in the instrument, and we have no doubt that a power may be effectively exercised without a reference to the instrument by which it was created. The settled rule is that a power may be executed without a reference to the instrument creating it. *Downie v. Buennagel*, 94 Ind. 228; *South v. South*, 91 Ind. 221. But the question of difficulty is as to the nature and extent of the power created by the will of Thomas Crew.

The power is not an absolute one; on the contrary, it is limited and qualified. It is restricted to a class comprising several persons, for it is beyond controversy that the power is to distribute property among persons designated by the testator. The authorities cited by the appellee are far from proving that a power created by words, such as those employed by the testator in this instance, is even a general power. Of *Denson v. Mitchell*, 26 Ala. 360, it may be said: First, the question there was as to the estate of the devisee, not as to the mode of exercising the power, and, second, the power was unqualified and unrestricted. In *Doe v. Thorley*, 10 East, 438, there were no limiting words, nor were there any such words in *Henderson v. Vaulx*, 10 Yerger, 30.

The power which Mrs. Crew assumed to exercise was a special power, and the only question is as to what property was limited. If it covered both the personal and the real property, the appellee must succeed; if it embraced only the personal estate, she must fail. The problem for solution is whether the real estate and the personal property were placed

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in the hands of Mrs. Crew with the absolute power of disposition. If the will unifies the entire estate, and solidifies in one class both the real and the personal property, then she had authority to disinherit the children of the testator, and devise all the real estate to her daughter. If, on the other hand, the testator did not intend to bring the real estate under the power by making a single class of property, Mrs. Crew could not defeat the law by disinheriting the heirs and appointing her child to take the fee.

The will, as we have seen, limits the estate of the first taker to life, and gives her control of the real property "so long as she shall live," hence she is excluded from exercising any other power except that which resides in a tenant for life. The express mention of one thing excludes all others, and hence the limitation of the power of control to life implies that with life all control terminates. In respect to the personal property, it is otherwise; for, as to that, it is clear that a right was vested in Mrs. Crew to use such of it as she chose, and to distribute what remained at her death at her pleasure, subject only to the limitation that it must be distributed among the members of the class designated by the testator. There is an express division of the property into classes, and not an unification, for it is provided that one species of property may be transferred, but the other can not be consumed or conveyed. The personal property was placed under the dominion of Mrs. Crew for the purposes named in the will, but the real estate was only placed under her dominion so long as she lived. The real estate could, by no possibility, remain in the hands of the widow of the testator at her death, since her death terminated her life-estate, and the power only authorizes her to distribute what remained in her hands. The power is even further limited, for the words of the will are, "such distribution shall not take effect until after her death." As the personal property is given to her to use and to consume, and only possession and control of the real estate are given for

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life, it is difficult to conceive how the two kinds of property can be regarded as so interfused as to constitute only one class, or species. If, to illustrate by example, the testator's widow had undertaken to convey to her daughter, by deed, the conveyance would have been ineffective, inasmuch as there was no authority vested in her to convey the fee; for, to repeat what has been said, her estate was for life, and her control was limited to the duration of her estate. To hold that the authority extended beyond life would be to affirm that she took control beyond the time expressly designated by the will. She was not, it is to be remembered, empowered to distribute property generally, but her authority was limited to "whatever remains in her hands," and as she could not convey the fee of the real estate, but could transfer the personal property, the phrase "whatever remains in her hands" can only mean personal property. But more than this, the fee was never in her, for at no time did she have, or could she have, anything more than a life-estate, and as the fee did not "remain in her hands," the power could not operate upon it. Either it must be true that the power did not operate on the fee, or else it must be true that it operated upon an estate not in her hands; but the latter alternative is excluded by the terms of the will, so that it must be true that the real estate was not placed under the power.

The estate vested in Mrs. Crew being a life-estate she had no such seizin, in virtue of that estate, as empowered her to create a fee by appointment. Sugden gives this illustration of the rule: "If a life-estate, for example, were conveyed to A., to such uses as B. should appoint, and B. were to appoint C. in fee, this disposition could not take effect beyond the interest conveyed to A." Sugden Powers, 231. How far this rule extends it is not important to inquire, for it is sufficient to here employ it as showing that the seizin of the life tenant was not, in itself, sufficient to empower her to create a fee, and to prove also that the fee was not in her. If the fee was not in her at any time, it could not, of course,

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remain in her hands at her death. If the fee was not elsewhere, it was in the heirs, for it was not taken from them by simply carving out the particular estate. If it was not taken from the heirs by the power of appointment, it was a vested remainder at the time of the testator's death. The law favors the vesting of remainders, and presumes that words postponing the estate in remainder relate to the beginning of the enjoyment of the estate, and not to the time of its vesting. *Amos v. Amos*, 117 Ind. 37; *Amos v. Amos*, 117 Ind. 19. We are required by this familiar rule to hold that the remainder, if there was one, vested at the time of the testator's death, although the enjoyment was postponed until the death of the devisee of the particular estate. This must be so, unless the words of the will clearly overthrow the rules of law, and this they do not do. If the remainder did vest, no subsequent event could destroy it. In other words, if the remainder in fee was once effectually vested in the heirs, there it remained, for no one was clothed with power to divest it.

Another rule is here influential, and that is this: An heir can not be disinherited, unless the intention to disinherit be expressed, or is to be clearly and necessarily implied. Where one construction of an ambiguous will leads to a disinheritance of the heir, and another to a result favorable to the heir, the latter construction must be adopted. These familiar rules support the decisions in the cases of *Jenkins v. Compton*, 123 Ind. 117, and *Wood v. Robertson*, 113 Ind. 323. The last named case is of controlling influence in this case, since there is no difference in principle between the two cases, although the words of the will in this case are more favorable to the heirs than the words of the will construed in the case to which we have referred. In that case it was said: "It is true, the testator added to the life-estate a power of disposition, but this does not change the effect of the will upon property remaining in the possession of the widow at the time of her death."

If the testator did not dispose of the fee by a valid and ef-

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fective devise, it unquestionably vested by force of law in his heirs. If he did effectively dispose of it, the disposition must have been made by other and stronger words than those which limited the estate of Mrs. Crew to one for life. It is almost impossible to conceive stronger or clearer words than those which fix the duration of her estate; at all events, we find no words in the will equal in power to those which limit the life-estate, and this limitation necessarily leaves the remainder in fee where the law casts it. The remainder can not be elsewhere placed, unless we hold that the subsequent words of the will make the remainder a contingent one, and leave the heirs without any interest in the fee.

The only words of the will before us which tend to support the conclusion that the testator meant to cut off his own children, or put it in the power of the stepmother to do so, are these: "But before her death I desire her to provide, by will or otherwise, for the disposition of whatever of my estate may remain in her hands, among her and my children." We have shown, as we believe, that these words refer only to the personal property, but if this be not clear, and there is doubt as to the true construction to be placed upon the will, then, under the rules stated, we must give the will a construction that will vest the remainder and protect the heirs, since those rules require us to resolve ambiguous provisions in favor of a vested remainder, and of the heirs. The only words which oppose our conclusion are the words "my estate;" but these words can not prevail against the other words of the will, aided, as they are, by the settled rules of law. The decisions support us in declaring that such a general word as "estate" may be justly construed to mean one species of property only, and that it does not always mean both real and personal property. *Goudie v. Johnston*, 109 Ind. 427; *Giles v. Little*, 104 U. S. 291; *Smith v. Bell*, 6 Peters, 68; *Brant v. Virginia, etc., Co.*, 93 U. S. 326; *Green v. Hewitt*, 97 Ill. 113 (37 Am. Rep. 102).

Judgment reversed.

Filed May 19, 1891; petition for a rehearing overruled Sept. 16, 1891.

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No. 16,153.

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**HENDERSON, AUDITOR, v. THE BOARD OF COMMISSIONERS
OF THE STATE SOLDIERS' AND SAILORS' MONUMENT.**

SOLDIERS' MONUMENT.—*Statute Construed.*—*Incidental Expenses.*—*From What Fund Paid.*—*Appropriation.*— Under the act of March 3d, 1887, providing for the erection of a State Soldiers' and Sailors' Monument, etc., no part of the sum of \$200,000 appropriated for the erection of the monument can properly be expended in the payment of merely incidental expenses. There is a sufficient appropriation in said act to make it the duty of the auditor of State to draw warrants for the payment of such incidental expenses out of the "General Fund" in the State treasury. The act provides for the incurring of said incidentals, and directs that the same shall be paid. This is sufficient. The use of technical words in a statute making an appropriation is not necessary.

From the Marion Circuit Court.

A. G. Smith, Attorney General, for appellant.

W. E. Niblack and A. J. Beveridge, for appellee.

McBRIDE, J.—This was an application by the appellees, the board of commissioners of the State Soldiers' and Sailors' Monument, for a writ of mandate against the appellant as auditor of State.

The controversy can be best stated by quoting the complaint, which is brief, and, omitting prefatory matter, is as follows:

"Your petitioners, George J. Langsdale, Thomas W. Bennett, Mahlon D. Manson, George W. Johnson and DeWitt C. McCollum, respectfully say that they constitute the board of commissioners of the State Soldiers' and Sailors' Monument, provided for by the act known as 'An Act to provide for the erection of a State Soldiers' and Sailors' Monument, or Memorial Hall or Monument and Memorial Hall combined, according to the discretion of the trustees in this act provided for, and declaring an emergency,' approved March 3d, 1887; that said board of commissioners, soon after its

Henderson, And'r, v. Board of Comm'rs of State Soldiers', etc., Monument.

organization, proceeded to erect a Soldiers' and Sailors' Monument, as provided in said act, at an estimated cost not exceeding two hundred thousand (\$200,000) dollars, the amount appropriated by said act; that the sum of ninety-nine thousand and four hundred and forty-one dollars and eleven cents (\$99,441.11) has been expended in structural expenses upon said monument, and that contracts are outstanding for additional work to be performed upon, and material to be used in the erection of said monument, to meet and discharge which the further sum of ninety thousand nine hundred and eighty-two dollars and sixty cents (\$90,982.60) will be required; that other sums of money have been expended, as incidental expenses, by said board of commissioners in the discharge of their duties, which have devolved upon them, no part of which incidental expenses has been applied in payment of the structural expenses hereinabove referred to, and which your petitioners are advised and believe are not properly payable out of the amount appropriated by the act for the erection of the monument in question, as follows:

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| For payment of architects, including plans and model | \$10,348 35 |
| For commissioners' per diem, travelling and hotel expenses | 8,879 82 |
| For engineering | 15 00 |
| For experts | 1,404 25 |
| For attorneys' services | 165 00 |
| For office and miscellaneous expenses | 1,892 23 |
| For secretary's salary | 1,817 25 |
| For printing and stationery | 1,401 77 |
| For superintendence | 2,265 50 |
| For advertising | 795 11 |
| For removing Governor Morton's monument out of the way | 203 25 |
| Making a total of | \$29,187 53 |

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"Your petitioners say that said several sums of money are merely incidental expenses; that no part of them are structural expenses; but notwithstanding the fact that said sums are purely and solely incidental expenses, they have nevertheless been paid by the treasurer of State upon warrants issued by the auditor of State, and against and in the face of the repeated request of said board of commissioners not to do so, and their repeated protest against so doing, have been by said auditor of State charged to and against the fund of two hundred thousand (\$200,000) dollars created and set apart by the above recited act, for the erection of a Soldiers' and Sailors' Monument, known as the 'Monumental Fund;' that they, said petitioners, have demanded of John O. Henderson, who is the present auditor of State, that he shall transfer the several sums, all of which are purely incidental expenses, from said 'Monument Fund,' and charge the same to and over against the 'General Fund' in the hands of the treasurer of State, for the payment of current expenses, and that the said John O. Henderson has failed and refused and still fails and refuses to comply with their said demand either in whole or in part or in any respect.

"Wherefore, your petitioners pray that an alternative writ of mandate shall be issued and directed to the said John O. Henderson, requiring him to so transfer said several sums of money so paid and classified, as merely incidental expenses, from said 'Monument Fund,' and to charge the same to and over against what is known as the 'General Fund,' in the State treasury, as above stated, or else to show cause why he shall not or ought not to do so, and will ever pray.

WILLIAM E. NIBLACK,

"ALBERT J. BEVERIDGE,

"Attorneys for Petitioners.

"George J. Langsdale, one of the above named petitioners, being duly sworn, says that he is the president of said board of commissioners of the State Soldiers' and Sailors'

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Monument, and that he is fully conversant with the facts and matters set out in the foregoing petition; and that the matters and things alleged in the foregoing petition are true, as he is informed and verily believes.

“GEORGE J. LANGSDALE, President.

“Subscribed and sworn to before me, a notary public in and for the county of Marion, State of Indiana, this 20th day of April, 1891.

EVA EDWARDS,

“[SEAL.]

Notary Public.”

The appellee appeared, waived the issuance of an alternate writ of mandate, and demurred to the petition on the ground that it did not state facts sufficient to entitle the petitioner to an alternative or peremptory writ of mandate. The demurrer was overruled, and the appellant, excepting to the ruling, declined to plead further. Judgment was rendered awarding a peremptory writ of mandate, and from such judgment this appeal is prosecuted.

The questions presented call for a construction of the act approved March 3d, 1887, known as the State Soldiers' and Sailors' Monument Act. Acts of 1887, p. 30. Elliott's Supp., section 2048.

The appellee insists that the sum of \$200,000 appropriated by that act was intended by the Legislature to be devoted solely to the structural expense of erecting the monument; that no part of it was to be used for the payment of incidental expenses, and that all incidental expenses are to be paid from the general fund in the State treasury. The appellant's contention is, that the sum appropriated was intended to cover the entire amount to be paid by the State toward the erection of the monument, and that there is no appropriation of any other sum for the payment of incidental expenses.

The provisions of the act in question are, substantially, as follows:

“Section 1. The sum of two hundred thousand dollars
* * is hereby appropriated, out of any moneys in the

Henderson, Aud'r, v. Board of Comm'rs of State Soldiers', etc., Monument.

treasury not otherwise appropriated, for the purpose of erecting a State Soldiers' and Sailors' Monument, said appropriation to be used in connection with such other funds as have already been, or may hereafter be, donated and contributed for said purpose."

Section 2 provides for the appointment of five commissioners, prescribes their oath of office, requires them to each give bond in the sum of \$5,000 for the faithful performance of their duties, and further conditioned that the cost of the monument shall not exceed the appropriation, with donations and contributions; fixes their compensation at four dollars per day, and travelling expenses, and provides for the filling of vacancies.

Section 3 prescribes certain of their duties, locates the monument in Circle Park, in the city of Indianapolis, and authorizes the making of certain contracts with the city.

Section 4 requires the commissioners to prepare, select, or adopt a design for the monument, to advertise for plans, designs and specifications, to offer a premium of \$1,000 for the best, and \$500 for the second-best design, with authority to reject any and all designs offered, and to readvertise as often as may be necessary to procure suitable designs and plans, and authorizing them to employ experts to examine all plans, and test all estimates submitted.

Section 5 authorizes the letting of contracts for the work, and prescribes the manner of paying the contractors.

Section 6 prescribes the material to be used in the erection of the monument, and requires the architect to give bond, with sureties, in the penal sum of \$10,000, "conditioned that said plan shall be perfect and complete for the purpose designed and intended, and that the monument shall be fully completed and finished as a whole, and in every part, for and within the price and cost estimated and fixed by said architect, and which price or cost shall be stated in his proposition or submission of plan and specifications." This section also forbids the making of any change in the plans

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or specifications which will increase the aggregate cost of the monument so as to exceed the cost prescribed in the act.

Section 7 authorizes the appointment of a secretary, prescribes his duties and fixes his compensation at \$75 per month.

Section 8 authorizes the commissioners to employ a superintendent, whose duties and compensation they are authorized to fix.

Section 9 forbids members and officers of the board to have any interest in any contract connected with the erection of the monument and prescribes penalties.

Section 10 makes the architect, when plans are accepted, the supervising architect, requires of him a bond as such supervising architect and provides for his compensation.

The case of *Campbell v. Board, etc.*, 115 Ind. 591, involved the construction of this act. It was there held, that it was the intention of the Legislature that the entire sum of \$200,000, appropriated, should be devoted, so far as used at all, to the structural work of the monument, and that all incidental expenses, such as are involved in this case, must be paid from the general fund in the State treasury, and that there was sufficient in the act to operate as an appropriation, authorizing the auditor of State to draw warrants on the treasurer of State to pay the same.

That case is vigorously attacked by the appellant, and we are asked to overrule it.

It is manifest that if *Campbell v. Board, etc., supra*, was correctly decided, it is decisive of the case now before us. After careful consideration of the question, we are of the opinion that the conclusion reached in *Campbell v. Board, etc., supra*, was correct.

Section 1, of the act, appropriates \$200,000 for the purpose of *erecting* a monument.

Section 4 provides for advertising for plans and specifications for a monument to cost not exceeding that amount.

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The commissioners and architect each and all give bond that it shall not exceed in cost that amount. If the incidental expenses are all to be deducted from the \$200,000, how can the board of commissioners or the architect act safely and intelligently in the preparation and acceptance of plans and specifications? If they understand that a certain definite sum is available for structural work, they have a tangible basis upon which to calculate. The act compels the incurring of certain incidental expenses, the amount of which is necessarily uncertain. No one can tell in advance what events may occur to delay or prolong the prosecution of the work, or how much time the commissioners may have to give to it. It can not be foretold how often they may have to advertise for plans and specifications before such plans will be submitted as will meet the requirements. Nor could they tell in advance how often they might be compelled to employ experts to assist in the selection of plans and test estimates.

Already incidental expenses have been incurred and paid amounting to more than \$29,000. It is not claimed that any of them were not necessary to the proper prosecution of the work. It is not possible to foretell how much time will still be required for the completion of the work, and, as a consequence, how much additional must be paid for salaries and other incidental expenses.

When the commissioners advertised, inviting plans and specifications, upon what basis were architects invited to make their estimates? Did the Legislature intend to say to them, "First guess upon the probable amount of the \$200,000 which will be absorbed in incidental expenses, and bind yourself with sureties, in the penal sum of \$10,000 that your guess is right?"

To give to the act the construction contended for by the appellant, would be to hold that the Legislature required at the hands of the commissioners and architect very unreasonable, if not impossible, things; but if the intention of the

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Legislature was that the \$200,000 should be devoted alone to structural work, the commissioners could easily select a design and let a contract for the erection of a monument within the limits named.

The case of *Board, etc., v. Whittaker*, 81 Ind. 297, is in point. The Legislature appropriated \$2,000,000 for the building of a new State House, and limited the entire cost to \$2,000,000. The provisions of the two acts are very much alike—indeed, the act providing for the erection of the monument is, in many of its provisions, and in some entire sections, literal copies of the act providing for the erection of a new State House, which will be found in the acts of the special session of 1877, page 68.

Like the act now in question, that act not only in express terms limited the cost of the building to \$2,000,000, but also required the giving of bonds both by the commissioners and by the architect.

The bond required of the commissioners was conditioned that the cost of the building should not exceed \$2,000,000, and the bond required of the architect was conditioned that the building should be "fully completed, and finished as a whole, and in every part, for and within the cost and price estimated, and paid by such architect." The court held that the sum of \$2,000,000 might be expended in the *construction* of the new State House, and that in addition thereto all incidental expenses, such as salaries, travelling expenses of the board, compensation of architect, secretary and superintendent, rent, etc., might be paid out of the fund denominated the "New State House Fund," but that such expenses should not be deducted from the \$2,000,000 which might be expended in what might strictly be called the construction of the building.

So in this case we hold, that the sum of \$200,000, appropriated for the erection of the monument, can only be expended in the actual structural work, and that no part of

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it can properly be expended in the payment of merely incidental expenses.

Counsel for appellant insists that the case of *Board, etc., v. Whittaker, supra*, is not authority, because a special tax was levied for the collection of a special State House fund, while there is no special monument fund. This can not affect the question, as the application of the sum limited for the erection of either structure is not made to depend upon the amount of money belonging to any special fund. The board of State House commissioners were limited to the expenditure of \$2,000,000 in the erection of the State House, without regard to the amount realized from the special tax levied for that purpose.

The question remains, is there an appropriation authorizing the auditor of State to draw warrants on the treasurer of State for the payment of the incidental expenses?

In *Campbell v. Board, etc., supra*, the court said: "It is true, as claimed, that no money can be rightfully drawn from the treasury except in pursuance of an appropriation made by law, but such an appropriation may be made impliedly, as well as expressly, and in general, as well as specific terms. * * The use of technical words in a statute making an appropriation is not necessary. There may be an appropriation of public moneys to a given purpose without in any manner designating the act as an appropriation. It may be said generally, that a direction to the proper officer, or officers, to pay money out of the treasury on a given claim, or class of claims, or for a given object, may, by implication, be held to be an appropriation of a sufficient amount of money to make the required payments." Citing *Ristine v. State, ex rel.*, 20 Ind. 328.

It is possible, as claimed by the appellant, that the language above quoted was outside of the question before the court in that case. It, however, states the law correctly, and we fully approve and adopt it. The eighth subdivision of section 5611, R. S. 1881, authorizes the auditor of State to

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"Draw warrants on the treasurer for all moneys directed by law to be paid out of the treasury to public officers, or for any other object whatsoever, as the same may become payable." The act providing for the erection of the monument expressly authorizes the incurring of each of said several items of incidental expenses, and directs that the same shall be paid. We think there is a sufficient appropriation to make it the duty of the appellant to draw warrants for the payment of the same. For a very full discussion of what constitutes an appropriation of money, see the case of *Carr v. State, ex rel.*, 127 Ind. 204.

The judgment of the Marion Circuit Court is affirmed, with costs.

Filed June 12, 1891; petition for a rehearing overruled Sept. 16, 1891.

No. 15,789.

KNIGHT, TRUSTEE, ET AL. V. WOODS, ET AL.

SCHOOLS.—*Location of School-House by Trustees.*—*Appeal to County Superintendent.*—By section 4537, R. S. 1881, an appeal lies in the matter of locating a township school-house from the decision of the township trustee to the county superintendent, and the decision of the superintendent is final.

SAME.—*Decision of Superintendent.*—The decision of the superintendent is binding on the trustee from the time it is given, though not entered in the superintendent's record until afterwards.

From the Gibson Circuit Court.

M. W. Fields and *J. W. Ewing*, for appellants.

T. R. Paxton, for appellees.

OLDS, J.—This was a suit by the appellees to enjoin the appellants from building a school-house on certain real estate condemned and paid for by the trustees for such pur-

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| 166 | 140 |
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pose, and situate in Patoka school township, in Gibson county.

The only assignment of error presenting any question is the error of the court in its conclusions of law, there being a special finding of facts and conclusions of law stated by the court.

The facts found show that appellant Knight, trustee of said township, on the 6th day of September, 1889, instituted proceedings in the Gibson Circuit Court against the owners of the real estate described in the complaint, and upon which he was about to erect a school-house, to condemn said land for school purposes for said township; that the defendant in said proceedings made default, and such proceedings resulted in a judgment of said court, on the 27th day of September, 1889, condemning said land upon payment of the damages assessed and costs; that on the 1st day of October, 1889, the said trustee paid to the clerk of said court the amount of damages assessed, with costs, to wit, \$91.05; that none of the appellees were parties to such proceedings; that said real estate is situate in school district No. 11, in said township; that plaintiffs are resident voters of said district, owners of property, real and personal, situate therein liable to taxation, and all, except appellee Woods, have children between the ages of six and twenty-one years, who are entitled to the privileges of the common school in said district and township; that on September 20th, 1889, said appellees and others, resident voters and taxpayers of said school district, delivered to said trustee Knight their petition in writing, wherein said petitioners objected to said real estate as a location for a school-house, and asked said trustee not to locate or build a school-house on said land, and asked that he locate and build at another point on other lands in said district. On the 23d day of September, 1889, other resident taxpayers and patrons of said school petitioned said trustee asking that he build a school-house on said land; that said trustee made no entry in his record of any decision

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on the matters presented by said petitions or either of them, and gave no notice of having made any decision on the matters presented by said petitions or either of them. On the 3d of October, 1889, said trustee caused a notice to be published in a newspaper, published at Princeton, in said county, that he would receive bids until October 25th, 1889, and on said date would let the contract for building a school-house on said real estate. On the 22d day of October, 1889, the plaintiffs, by their written notice of appeal of that date, appealed the matter of locating a school-house on said real estate from said trustee to the county superintendent of Gibson county; that said trustee prepared and delivered to Thomas W. Cullen, then superintendent of said county, a statement, in writing, of his proceedings in relation to the location of said school-house upon said real estate, and certified to the same as being a complete transcript of his record, and at the same time delivered to said superintendent the original papers, petitions and notice; that said trustee appeared before said superintendent in the matter of said appeal, and submitted the question of locality to said superintendent for decision, and extended the time of letting the contract for building said school-house until November 1st, 1889, to give time for the superintendent to render his decision. On the 29th day of October, 1889, said superintendent gave to said trustee notice, in writing, that he had decided that said school-house should be built at another point on other real estate in said district; and on the same day said superintendent made an entry on his record stating that he grants the appeal, and condemns said location of said trustee as unfit and unhealthy, and then proceeds to locate the school-house at another point, designating it. The portion of the record of the superintendent condemning the location selected by the trustee was not entered of record until after this suit was commenced, November 5th, 1889. The real estate on which the superintendent ordered the

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school-house to be erected was not owned by the township; that on the 1st day of November, 1889, said trustee, with full knowledge of the decision of said superintendent, ignored said decision and contracted with appellant Williams for the construction of a school-house on the land so condemned for that purpose, to be paid for out of the public funds of said township in his hands, and said Williams is threatening to, is about to, and will build said house; that said trustee made no entry in his record concerning the location or building of the school-house, or the condemning of the land, until after the commencement of this suit, December 20th, 1889, and it does not appear what record was made at that date.

As a conclusion of law the court stated that appellees could maintain the action, and that appellants should be permanently restrained from building said school-house on the site selected by said trustee, and judgment was rendered accordingly.

We do not think there was any error in the conclusions of law stated by the court. By section 4537, R. S. 1881, appeals lie in matters of this character from the decision of the township trustee to the county superintendent, and the decision of the superintendent is made final. In so far as the decision of the county superintendent related to the condemning and prohibiting of the erection of the school-house on the site designated by the trustee, it was within his jurisdiction, and was valid and binding upon the trustee, and took from the trustee all authority to build a school-house on that site. The finding of facts shows that this decision was made upon the 29th day of October, 1889, and that the trustee had full knowledge of the decision when he let the contract to Williams, though it appears that such portion of the decision was not entered on the superintendent's record until after November 5th. The decision was binding though not entered until afterwards. *Tufts v. State, ex rel.*, 119 Ind. 232.

Knight, Trustee, et al. v. Woods et al.

It is contended by counsel for appellant that the duty of building and providing proper school-houses is enjoined on the trustee by section 4444, R. S. 1881; that it is exclusively within the discretion of the trustee, and can not be affected by an appeal to the county superintendent; that the right of appeal lies only when proceedings are instituted by the voters of the school district, as provided by section 4499, R. S. 1881, and that in no event can the sound discretion of the trustee be controlled, as declared in the proviso to section 4499, *supra*. The proviso appended to section 4499, *supra*, relates to the action taken by the voters in relation to repairs, removing or erecting school-houses, and costs thereof, and provides that the action taken by the voters shall not be conclusive and prevent the trustee from the exercise of a sound discretion. While section 4537, *supra*, gives the right of appeal in such matters to the county superintendent, and makes his decision final, there is no inconsistency in these sections of the statute. The trustee first determines in regard to the erection, building, or removing of school-houses, and from his decision there is an appeal to the county superintendent, and his decision is made final. The decision of the superintendent in this case went beyond his power in ordering the school-house erected on another site, not owned by the township, and that portion of his decision is probably void; but that question is not involved in this case.

It is further contended that the appeal was not taken from the trustee within the proper time, but the date when the trustee made his decision is not shown by the finding of facts. No entry of it was made of record, and the voters of the district, and patrons of the school, were in no way notified of his having made it. He paid for the land October 1, and afterwards gave notice that he would let a contract for the building of a school-house. When these steps were taken, the appellees took immediate steps to preserve their rights. The trustee granted the appeal, and appeared and submitted

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the question to the county superintendent for decision, and by such decision he was bound.

The judgment is affirmed, with costs.

Filed Sept. 16, 1891.

No. 15,180.

SPAULDING v. HARVEY ET AL.

SUBROGATION.—Void Mortgage.—Judgment.—Payment of by Mortgagees.—A husband and wife, who were under guardianship, falsely represented that the guardianship had been terminated, and that they had been adjudged of sound mind, and they induced a firm of attorneys to accept a mortgage on the undivided interest of the wife in certain real estate, to secure the compensation agreed upon for legal services to be rendered. Prior to the date of the guardianship a judgment had been rendered against the wife, which was a lien upon her interest in the real estate mortgaged as aforesaid.

Held, that the mortgage was void by reason of the legal incapacity of the mortgagors to execute the same.

Held, also, that the attorneys, having paid off the judgment rendered against the wife to protect what they erroneously supposed was a valid mortgage, were entitled to be subrogated to the lien of said judgment, with priority over a judgment rendered in favor of the guardian for services, etc.

SAME.—Right of.—Upon what Depends.—The right of a creditor to be subrogated to the securities of one whose claim he has paid, does not depend upon the solvency or insolvency of the debtor, but upon the circumstances attending the payment of the debt, to which the security was an incident.

SAME.—The right of subrogation does not depend upon or grow out of the ability of the parties to make valid contracts, as it is not founded upon contract, either express or implied, but upon principles of equity and justice, intended to afford protection to a meritorious creditor, and prevent the sweeping away of the fund, from which, in good conscience, he ought to be paid.

From the Grant Circuit Court.

A. E. Steele and J. A. Kersey, for appellant.

G. W. Harvey and H. J. Paulus, for appellees.

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| 147 | 423 |
| 129 | 106 |
| 150 | 478 |
| 150 | 428 |
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| 164 | 135 |

Spaulding v. Harvey *et al.*

McBRIDE, J.—November 28th, 1886, Almaretta Lockwood, one of the appellees herein, was the owner of an undivided interest in certain land in Grant county. On that day one Josiah Ferguson recovered a judgment in the Grant Circuit Court against her for \$30 and costs, which became a lien on her interest in the land. December 28th, 1886, she, with her husband and co-appellee James H. Lockwood, were, by the Wells Circuit Court, adjudged of unsound mind, and incapable of managing their respective estates, and the appellant was duly appointed their guardian.

The guardianship was terminated by a judgment of the Wells Circuit Court, on the — day of April, 1887, declaring them restored to their right minds, and again capable of managing their estates. On the 26th day of January, 1887, the Lockwoods applied to the appellees, Harvey and Paulus, to act as their attorneys in the institution and conduct of certain litigation, and represented to them that they had been already adjudged of sound mind, and their guardianship terminated. Harvey and Paulus, not knowing that this was untrue, accepted and entered upon the duties of the employment, and, to secure the compensation agreed upon, took from the Lockwoods a mortgage on the land in Grant county. On the day the mortgage was executed the land was advertised for sale by the sheriff of Grant county, on an execution issued on the Ferguson judgment.

Harvey and Paulus, to save the land from sale, and thereby protect their mortgage, paid to the sheriff \$48.43, the amount of the judgment, with costs. This suit was originally commenced to foreclose the mortgage, but the Lockwoods and the appellant, who was joined as a defendant, attacked the validity of the mortgage, on the ground of the incapacity of the mortgagors when it was executed. The appellant, also, by a separate answer, which was supported on the trial by proof, showed that when he was discharged as guardian the Wells Circuit Court allowed him, for services, money expended, etc., \$373.78, which the court adjudged to be a spe-

Spaulding v. Harvey et al.

cific lien on the mortgaged land, and that a transcript of the judgment had been duly filed and recorded in the clerk's office of Grant county.

Harvey and Paulus thereupon, with leave of the court, and without objection from the defendants, filed a second paragraph of complaint, alleging the facts substantially as above stated, and asking to be subrogated to the lien of the Ferguson judgment. This paragraph also contained averments charging that the representations made by the Lockwoods to Harvey and Paulus, that they had been adjudged of sound mind and relieved from guardianship, were not only false, but were fraudulently made to induce them to act as such attorneys and accept said mortgage. The circuit court found these averments to be true, and adjudged the mortgage void, but sustained the claim of Harvey and Paulus to be subrogated to the lien of the Ferguson judgment, with priority over the judgment of the appellant.

This conclusion of the court is vigorously attacked by the appellant, who insists that the mortgage being void, and the mortgagors incapable of contracting, the payment by the appellees of the Ferguson judgment was voluntary, and by persons standing in the relation of strangers to the debtors, and will not entitle them to subrogation.

In this the appellant is wrong, and the judgment of the circuit court is right. True, the mortgage was void, because the mortgagors were, by the express terms of the statute, legally incapacitated from contracting. One may, however, be so weak intellectually as to be incapable of managing his estate, and thus be legally subjected to guardianship, and still be capable of perpetrating a fraud.

The court has found in this case that these parties, by means of the representations made, not only secured the services of the appellees, as attorneys, but also induced them to save their land from sale by the sheriff by paying the Ferguson judgment. It is certain that they obtained a substantial benefit. To sustain their present claim would be to re-

Spaulding v. Harvey *et al.*

lieve them wholly from liability for the Ferguson judgment, without having rendered any equivalent whatever therefor.

The statute which provides for the guardianship of those *non compos*, and for the conservation of their estates, is intended to protect them from the consequences of their mental weakness, and to guard against the danger of wrong being done to them by the dishonest and the unscrupulous. It was never intended to serve as an intrenchment to shelter them from the consequences of such wrongs as their limited capacity gave them the power to knowingly perpetrate upon others.

Indeed, if no question of fraud, or of attempted fraud, entered into the transaction, it is a clear case calling for the application of the doctrine of subrogation, which does not depend upon or grow out of the ability of the parties to make valid contracts, as it is not founded upon contract, either express or implied, but upon principles of equity and justice, intended to afford protection to a meritorious creditor, and prevent the sweeping away of the fund from which, in good conscience, he ought to be paid. *Sheldon Subrogation*, section 4; 3 Pom. Eq. Jur., section 1419; *Rooker v. Benson*, 83 Ind. 250.

Assume that the mortgagors as well as the mortgagees acted in good faith, when the mortgagees, to protect what they erroneously supposed was a valid mortgage, paid the judgment, they were neither strangers nor volunteers. The fact that the mortgage proved to be void because the makers had not the legal power to make it, affords only stronger reasons why the equitable doctrine of subrogation should be invoked.

The second paragraph of the complaint, asking for subrogation, did not contain any averments of the insolvency of the debtors, or that they had no other property out of which the claim could be collected. Appellant demurred to this paragraph, on the ground that it did not state facts sufficient to constitute a cause of action, and the demurrer be-

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ing overruled, an exception was saved to the ruling. This ruling is assigned as error, appellant insisting that the omission of such averments, or their equivalent, makes the complaint bad. The question in this case is as to the preservation of a security in favor of a creditor.

The right of a creditor to be subrogated to the securities of one whose claim he has paid does not depend upon the solvency or the insolvency of the debtor, but upon the circumstances attending the payment of the debt to which the security was an incident.

Judgment affirmed, with costs.

Filed Sept. 19, 1891.

No. 14,937.

BARNES v. TURNER.

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| 141 | 504 |

BILL OF EXCEPTIONS.—*Evidence.*—*How Incorporated.*—The evidence in a trial can not be brought into the record by the words "here insert" in the bill of exceptions. The original bill must contain the evidence.

VERDICT.—*Answer to Interrogatories.*—Where the answers to interrogatories are not irreconcilable with the general verdict, and do not find all the facts entitling the appellant to a judgment, the general verdict will not be disturbed.

From the Decatur Circuit Court.

J. S. Scobey, for appellant.

J. D. Miller and *F. E. Gavin*, for appellee.

OLDS, J.—The appellant brought this suit in ejectment for the land described in the complaint. The appellee answered, and filed a cross-complaint, declaring title to all the land except a piece thirty rods square in the northwest corner of the tract. As to this he alleged an equitable title, and asked to have his title quieted.

There was a trial by jury, resulting in a general verdict for

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the appellee. The jury also returned answers to four interrogatories. Appellant moved the court for judgment in his favor on the interrogatories. This motion the court overruled, and entered judgment for the appellee, to which ruling the appellant excepted. Appellant also filed a motion for a new trial, which was overruled, and he reserved exceptions.

Error is assigned on the ruling of the court on each of the foregoing motions.

The ruling on the motion for judgment in favor of the appellant, as well as numerous questions arising on the evidence and instructions, is discussed by counsel for appellant.

The bill of exceptions sought to bring into the record the evidence, by stating in the bill the words "Insert the stenographic record of said evidence given on said trial."

The bill contained no evidence whatever at the time it was signed. The clerk inserts in the record what purports to be the stenographic report of the evidence, but it has been held in repeated decisions of this court that evidence can not be brought to this court in this manner; that the original bill must contain the evidence, and it can not be brought into the record by the words "here insert" in the bill of exceptions. *Clark v. State, ex rel.*, 125 Ind. 1; *Fiscus v. Turner*, 125 Ind. 46.

The evidence not being in the record, no question can be considered in regard to the evidence, nor is any question presented in relation to the instructions. We can not say that those given were not proper under the evidence, or that those refused ought to have been given.

Both the complaint and cross-complaint allege title generally; the complaint alleging a fee simple title in the appellant, and the cross-complaint alleging that the appellee is the owner, and has an equitable title to the small tract claimed.

We have examined the interrogatories and answers, and deem it unnecessary to encumber the record by setting them

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out, for it is clear that they are not irreconcilable with the general verdict, and they do not find all the facts entitling the appellant to recover the land in controversy. *Rice v. City of Evansville*, 108 Ind. 7; *Louisville, etc., R. W. Co. v. Stommel*, 126 Ind. 35; *Town of Poseyville v. Lewis*, 126 Ind. 80; *Ohio, etc., R. W. Co. v. Trowbridge*, 126 Ind. 391; *Lockwood v. Rose*, 125 Ind. 588; *Western Assurance Co. v. Studebaker, etc., Co.*, 124 Ind. 176.

There is no error in the record.

Judgment affirmed, with costs.

MILLER, J., took no part in the decision of this case.

Filed Sept. 19, 1891.

No. 14,560.

THE CITY OF RICHMOND v. DUDLEY.

MUNICIPAL CORPORATION.—*Ordinance Relating to Explosive Substances.*—

Invalidity of.—A city ordinance placing restrictions upon the keeping and storing of inflammable or explosive oils is invalid which fails to specify the rules and conditions to be observed in such business, and which does not admit of the exercise of the privilege by all citizens alike, who will comply with such rules and conditions; but which does admit of the exercise of an arbitrary discrimination by the municipal authorities, between citizens who will so comply.

From the Wayne Circuit Court.

A. C. Lindemuth, H. C. Fox and J. G. Robbins, for appellant.

C. H. Burchenal and J. L. Rupe, for appellee.

MILLER, J.—This was an action brought before the mayor of the city of Richmond against the appellee for the violation of a city ordinance regulating the storing and keeping of petroleum, and other inflammable oils, within the corporate limits. Judgment was rendered against the appellee before

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The City of Richmond v. Dudley.

the mayor, and the cause appealed to the Wayne Circuit Court. In that court demurrers were sustained to the several paragraphs of complaint, and judgment on the demurrer rendered against the appellant.

The only question before us is as to the validity of the ordinance.

The sections of the ordinance to which the objections are made are as follows:

"Section 1. *Be it ordained by the Common Council of the city of Richmond*, That it shall be unlawful for any person to keep or store any petroleum, naphtha, benzine, gasoline, coal oil, or any inflammable or explosive oils within the corporate limits of the city of Richmond, in quantities greater than five barrels at a time, except as hereinafter provided.

"Section 2. Any person desiring to keep or store any of the oils, or products mentioned in the first section of this ordinance within the corporate limits of the city, in quantities greater than five barrels at a time, shall present a written petition to the common council at a regular meeting thereof, setting forth an exact description of the location, premises, and buildings on, and in which it is proposed to keep and store such oils and products, and the manner and kind of vessels in which the same are to be kept, the kind of oils, and the purpose for which they are to be kept.

"Section 3. Upon the presentation of the petition, as provided in section two of this ordinance, the common council may, if the location and buildings described in said petition, and the purpose and keeping of such oils and products, are deemed suitable and proper, and that the person presenting such petition is a proper person, grant such permission to the person presenting such petition to keep and store such oils and products on the premises and in the manner set forth in the petition, or in the manner which the council may direct, in quantities greater than five barrels at a time, which permission so granted may be revoked at any time at the op-

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tion of the council ; and the rights and privileges to be exercised by the person receiving said permission shall not be assignable or transferable, by the person receiving the same, to any other person directly or indirectly, and any attempt so to do shall be deemed a revocation of all rights and privileges on the part of the person making the attempt."

Two objections are urged against the validity of this ordinance :

1. That it gives to the council the power to arbitrarily discriminate between citizens, by giving the permission to some and withholding it from others under similar conditions, and because it specifies no terms, or conditions, to be observed in the keeping or storing of such oils, which could be complied with by all citizens alike.

2. That the ordinance is unreasonable, and is an undue restraint upon lawful trade and business.

The subject covered by the ordinance in question is clearly within the police power conferred by the charter upon the municipality.

Section 3155, R. S. 1881, provides that the common council of a city shall have power to make by-laws and ordinances not inconsistent with the laws of the State, and necessary to carry out the objects of the corporation.

The danger to be apprehended to life and property from the storing of inflammable or explosive substances in large quantities within the limits of a city is so great as to invite legislative control of the same by the city government.

The principal question in this case is whether or not the ordinance in question is a valid exercise of that power.

It will be observed that this ordinance does not establish any general rules for the storage of the substances proposed to be regulated, but reserves to itself, at regular meetings, the right to grant or refuse permission to keep and store such oils, dependent upon whether it at such time deems the location and buildings suitable for such purpose, and the

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person presenting the petition "a proper person." It further provides that the permission when granted "may be revoked at any time at the option of the council."

Language better calculated to enable the common council to arbitrarily control the business, without any fixed or known rules, can not well be imagined. The business of keeping, storing and dealing in such oils is a legitimate business, and every citizen has an inherent right to engage in the business upon equal terms with any other citizen.

In the case of *Bills v. City of Goshen*, 117 Ind. 221, an ordinance of the city requiring a license for carrying on the business of roller skating, and providing that such license should be issued upon the payment into the city treasury of such sum of money "as the mayor or common council shall determine in each particular case," was held invalid, the objection being that a discretion was lodged in the mayor or common council in fixing the fee to be charged. In the opinion this language is quoted with approval from Horr and Bemis on Mun. Police Ordinances:

"The ordinance itself should specify every condition of the license, and the officer should be merely intrusted with the duty of issuing licenses."

In *Yick Wo v. Hopkins*, 118 U. S. 356, an ordinance of the city of San Francisco, prohibiting the carrying on of laundries without a permit from the board of supervisors, except in buildings constructed of stone, was held invalid. The court says: "It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which

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are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living."

In *Mayor, etc., v. Radecke*, 49 Md. 217, an ordinance of the city of Baltimore prohibiting the use of steam whistles without the permit of the mayor was held invalid. The objection to the ordinance was that it permitted him to exercise his own discretion in revoking a permit, without general rules to guide or control his action.

In *Barthel v. City of New Orleans*, 24 Fed. Rep. 563, an ordinance was held invalid which made it unlawful to maintain a slaughter-house, "except permission be granted by the council of the city of New Orleans."

In *State v. Mahner* (La.), 9 South. Rep. 480, an ordinance of the city of New Orleans forbidding the keeping of dairies within certain limits, except by the permission of the city council, was held to be null and void.

In *City of Newton v. Belger*, 143 Mass. 598, an ordinance which permitted the board of aldermen to exercise a discretion in granting or refusing a permit for the erection of buildings within a fire district was held invalid.

Ordinances, apparently aimed at the "Salvation Army," prohibiting marching through the public streets without first obtaining the consent of the mayor or common council, or some other specified officer, not containing regulations operating uniformly on all processions, have been held invalid in *Matter of Frazee*, 63 Mich. 396; *Anderson v. City of Wellington*, 40 Kan. 173; and *City of Chicago v. Trotter* (Ill.), 26 N. E. Rep. 359.

It seems from the foregoing authorities to be well established that municipal ordinances placing restrictions upon lawful conduct, or the lawful use of property, must, in order to be valid, specify the rules and conditions to be observed

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in such conduct or business; and must admit of the exercise of the privilege by all citizens alike, who will comply with such rules and conditions; and must not admit of the exercise, or of an opportunity for the exercise, of any arbitrary discrimination by the municipal authorities, between citizens who will so comply.

We are of the opinion that the ordinance under consideration is objectionable for the reasons indicated.

Having arrived at a conclusion that will necessarily not only dispose of the case, but invalidate the ordinance, we deem it unnecessary to pass upon the other objection to its validity.

The ordinance in its present form can not be enforced, and if another one should be enacted we must presume that the municipal authorities will, in their wisdom, enact a proper and reasonable ordinance.

Judgment affirmed.

Filed Sept. 17, 1891.

No. 15,030.

CRAWFORD ET AL. v. ANDERSON.

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PLEADING.—*Overruling Motion to Strike Out.*—*Not Reversible Error.*—Overruling a motion to strike out a pleading or a part of a pleading is not error for which a cause will be reversed.

PRACTICE.—*Circuit Court.*—*Presumption in Favor of Rulings.*—The circuit court is entitled to every reasonable presumption in favor of the regularity of its proceedings. In this court it must affirmatively appear that the court below erred to justify reversing its judgment.

SAME.—*Evidence.*—*Failure to Object to.*—Alleged error in the admission of evidence will not be considered on appeal where the record fails to show that any objection was made or exception taken in the trial court.

SUPREME COURT.—*Conflicting Evidence.*—*Reversal of Judgment.*—Where the evidence is conflicting, if there is some evidence tending to sustain the verdict, the judgment will not be reversed by the Supreme Court.

Crawford *et al.* v. Anderson.

MECHANIC'S LIEN.—*Dwelling and Appurtenant Buildings.—Joint Lien.*—

Where work has been done in the repair of a dwelling-house and out-buildings, which are appurtenant to the dwelling, a joint lien may be taken upon the dwelling with the appurtenant out-buildings.

From the Sullivan Circuit Court.

J. C. Chaney, W. S. Maple and C. Chaney, for appellants.
W. G. Hultz and O. B. Harris, for appellee.

MCBRIDE, J.—This was a suit to recover for work and labor alleged to have been done by the appellee in repairing a dwelling house, in building a veranda appurtenant to it, in removing and repairing a smokehouse, repairing a woodshed, and in repairing and building an addition to a barn, the latter buildings all being alleged to be situate on the same tract of land, and appurtenant to the dwelling-house. The complaint also asked the foreclosure of a mechanic's lien upon the property in question for the amount alleged to be due.

There was a trial, which resulted in a finding for the appellee, a judgment in his favor, with a decree foreclosing the lien. Several errors are assigned, and argued.

The first is, that the court erred in overruling a motion to make the complaint more specific. The record does not show that any such motion was made. There was a motion to strike out parts of the complaint, which was overruled, and counsel have argued at some length the error which they insist was thus committed. This question is not, however, properly before us. It is not covered by the assignment of errors. Even if it was, it has many times been decided by this court that overruling a motion to strike out a pleading or a part of a pleading is not error for which a cause will be reversed. *Rowe v. Major*, 92 Ind. 206, and cases cited; *McLean v. Equitable, etc., Society*, 100 Ind. 127, and many other cases.

The court overruled a demurrer to the complaint, and this ruling is assigned as error.

Crawford et al. v. Anderson.

The only objection urged to the complaint, in the brief of counsel, is that it is not sufficiently specific. The demurrer was correctly overruled. The complaint is clearly sufficient to withstand demurrer.

The appellee testified as a witness in his own behalf, and the court sustained objections to two questions asked him on cross-examination, on the ground that they were not proper cross-examination. It is impossible, from the state of the record, for us to say whether this was error or not. The testimony, instead of being set out in full, giving questions and answers, is in narrative form. It is apparent that the witness was examined in the usual way, but that for some reason the questions are omitted, and the answers so modified as to appear in narrative form. Judging from the narrative the questions were probably legitimate cross-examining questions. Yet it can not be certainly said that they were. The circuit court is entitled to every reasonable presumption in favor of the regularity of its proceedings. In this court it must affirmatively appear that the court below did err, to justify reversing its judgment. A mere probability of error is not sufficient.

Appellant asks a reversal of the cause for the reason that evidence was allowed to go to the jury, and was considered by them, of the building of a privy, which was not embraced in the complaint. The record fails to show any objection, or exception, to this testimony. Such an objection can not be heard for the first time in this court. The objection must be made, and the exception taken, in the trial court.

The evidence is conflicting, and there is some evidence tending to sustain the verdict. We can not, therefore, reverse the judgment on the evidence, as we are asked to do.

One other question is discussed. The work was done in the repair of several different buildings. There was but one notice of lien—joint, and covering all the buildings—and the suit was to foreclose the lien upon all together. This, the appellant insists, can not be done. There was but one tract

Witz, Administrator, v. Dale et al.

of land. The buildings consisted of a dwelling, a barn, and other buildings, all appurtenant to the dwelling, and all situate on the same tract of land. While it is true that a joint lien can not be taken on two or more separate and distinct buildings, for work done or material furnished in their construction or repair, there is no reason why a joint lien may not be taken upon a dwelling with all its appurtenant out-buildings. All are, in law, considered as one building. A man's dwelling-house is not alone the building which actually shelters him and his family, but includes the cluster of appurtenant buildings. 2 Bishop Crim. Law, section 104. The common law crime of burglary could only be committed by entering the mansion, or dwelling-house of another. Yet Blackstone says: "And if the barn, stable, or warehouse, be parcel of the mansion-house, and within the same common fence, though not under the same roof, or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenances, if within the curtilage, or homestall." 4 Blackstone, 225.

The cases of *Hill v. Braden*, 54 Ind. 72, and *Hill v. Ryan*, 54 Ind. 118, cited by the appellant, lay down no doctrine in conflict with this.

Judgment affirmed, with costs.

Filed Sept. 17, 1891.

No. 14,901.

WITZ, ADMINISTRATOR, v. DALE ET AL.

AGREED CASE.—*Agreed State of Facts*.—An agreed state of facts is not an agreed case under section 553, R. S. 1881, providing for submitting agreed cases.

SAME.—Where, as here, the proceeding on its face appears to be an actual adversary proceeding, and there is nothing to indicate that it is a feigned action, the agreement as to the evidence will not change the character

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Witz, Administrator, v. Dale *et al.*

of the case, nor will it overturn the presumption that there is an actual controversy.

LIMITATION OF ACTION.—*Suit to Enforce Legacy.*—*Fifteen Years' Statute of Limitations.*—A testator bequeathed to his son A. a legacy of two hundred dollars, and devised to his son B. the residue of his estate. The legacy to A. has never been paid. B. took possession of the real estate devised to him upon the death of his father. Testator owed no debts at the time of his death, and left no personal estate. On a judgment recovered against B. the land was sold, and a deed executed to the purchaser. The administrator, more than sixteen years after the will was admitted to probate, sought to enforce the legacy against the purchaser of the land, and petitioned for an order to sell the real estate of his decedent for the payment of debts due from the estate.

Held, that the suit is barred by the fifteen years' statute of limitations.

From the White Circuit Court.

J. H. Wallace and *M. M. Sill*, for appellant.

E. B. Sellers and *W. E. Uhl*, for appellees.

ELLIOTT, J.—The appellant petitioned for an order to sell real estate of his decedent for the payment of debts due from the estate. The petition is in the usual form, and is verified. Issues were formed and the case was submitted to the court upon an agreed state of facts.

Counsel for the appellant assert that the proceedings constitute an agreed case under the statute providing for submitting agreed cases, but in this they are in error. An agreed state of facts is simply the result of an agreement of the parties as to what the evidence in the case will prove. Many cases recognize and enforce the difference between an agreed case and a case where the evidence is embodied in an agreement as to the facts. Where there is simply an agreed state of facts, a motion for a new trial and the like are necessary, but it is otherwise where there is an agreed case. Where there is an agreed case under the statute an affidavit is required in order to show that there is an actual controversy, for courts will not hear or determine speculative questions, nor will they take cognizance of any legal controversies except those involving actual disputes between real parties.

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We refer to the following cases as sustaining our conclusion that this is not an agreed case within the meaning of the law. *Slessman v. Crozier*, 80 Ind. 487; *Downey v. Washburn*, 79 Ind. 242; *Godfrey v. Wilson*, 70 Ind. 50; *Manchester v. Dodge*, 57 Ind. 584; *Oppenheim v. Pittsburgh, etc., R. W. Co.*, 85 Ind. 471 (477); *Western Union Tel. Co. v. Frank*, 85 Ind. 480; *Citizens Ins. Co. v. Harris*, 108 Ind. 392; *Pennsylvania Co. v. Niblack*, 99 Ind. 149; *Zeller v. City of Crawfordville*, 90 Ind. 262.

Where, as here, the proceeding on its face appears to be an actual adversary proceeding, and there is nothing to indicate that it is a feigned action, the agreement as to the evidence will not change the character of the case, nor will it overturn the presumption that there is an actual controversy.

The facts embodied in the special finding are taken from the statement of facts agreed upon by the parties, and are, in substance, these: On the 2d day of December, 1868, the decedent, Daniel Dale, executed his last will, and it was admitted to probate on the 3d day of February, 1871. The appellant was appointed administrator with the will annexed on the 15th day of September, 1886. The deceased did not owe any debts at the time of his death, nor did he leave any personal estate. The decedent bequeathed to his son Harvey M. Dale a legacy of two hundred dollars, and devised to his son Oliver S. Dale the residue of his estate. The legacy to Harvey M. Dale has never been paid. Oliver S. Dale took possession of the real estate devised to him upon the death of his father. On the 24th day of June, 1873, Joseph Rothrock and others recovered a judgment against Oliver S. Dale, and on this judgment the land was sold to Joseph C. Wilson on the 2d day of January, 1875. A deed was executed to Wilson at the proper time.

It is doubtful whether the legacy to Harvey M. Dale can be considered a charge on the land, inasmuch as the bequest to Oliver S. Dale is based upon a consideration, but laying

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this element out of the case, we think it clear that the legacy can not be enforced against a *bona fide* purchaser of the land after so long a period as that which elapsed between the probate of the will and the beginning of this suit. The suit was brought more than sixteen years after the will was placed of record. There is here no element of trust, for the purchaser is in no sense a trustee. The right to sell the land depends entirely upon the right to enforce the legacy, for there are no debts. If there is no enforceable legacy there is no authority to sell the land. *Riser v. Snoddy*, 7 Ind. 442. It has been expressly decided that the fifteen years' statute of limitations applies to proceedings to sell land brought by an administrator to secure assets with which to pay debts, although the creditor's claim has been allowed, and the land is still owned by the heirs. *Cole v. Lafontaine*, 84 Ind. 446; *Scherer v. Ingerman*, 110 Ind. 428. There is much stronger reason for the rule where, as here, there is a mere gift and the land has passed into the hands of a *bona fide* purchaser. The decisions referred to are in harmony with those which hold that where no other statute of limitations applies to the particular case it is governed by the fifteen years' statute. *Nutter v. Hawkins*, 93 Ind. 260, and cases cited; *Martin v. Martin*, 118 Ind. 227, and cases cited. There must certainly be some limit to the time within which a legacy can be enforced where, as is true here, no trust exists, and that limit is fixed by the statute to which we have referred, inasmuch as it is comprehensive in its terms, and embraces all cases for which no specific provision is made. Section 294, R. S. 1881. Repose is the object of our entire system of limitation, and to prevent a break in the system by providing for all cases not otherwise provided for, was the manifest purpose of the Legislature in enacting the general statute. So all our decisions indicate, and this the repose of society, as well as the security of titles, demands.

Judgment affirmed.

Filed April 30, 1891; petition for a rehearing overruled Sept. 17, 1891.

Johnson v. Graves *et al.*

No. 15,057.

JOHNSON v. GRAVES ET AL.

JUDGMENT.—*Action by Administrator.—Res Adjudicata.—Widow's Statutory Allowance.—Election.—Evidence.*—A testator devised certain land to his wife for life, with remainder to his son. The widow died intestate. The son sold the land, and after intermediate conveyances the defendant became the owner. In an action by the administrator of the widow's estate to enforce the collection of the statutory allowance of \$500 against the land which the defendant had purchased, it was adjudged that the widow had elected to take under the will. To this action the defendant was made a party to answer as to his interest, and the plaintiffs were also made parties by reason of being heirs of the testator. Subsequent to this action the plaintiffs sued to recover a portion of one-third of the land, which they claimed to be entitled to as heirs of the widow, alleging that the widow did not elect to take under the will.

Held, that the record in the former action was not admissible in evidence on behalf of the defendant, as the plaintiffs were not estopped by the judgment rendered therein to assert title to the land.

From the Putnam Circuit Court.

B. Crane and *A. B. Anderson*, for appellant.

W. B. Herod, J. F. Harney, G. D. Hurley and *M. E. Clodfelter*, for appellees.

OLDS, J.—James McIver died testate in Montgomery county, Indiana, in February, 1884, seized in fee simple of the eighty acres of land described in the complaint, as well as other lands. He left surviving him his wife, Lucretia; a son, William; a married daughter, Malinda Mount; and a granddaughter, Permelia Graves. He devised the eighty acres described in the complaint to his widow, Lucretia, for life, with remainder over to his son, William. He devised to his son, William, 163 acres of other land in fee; to his daughter Malinda eighty acres of land in fee, and to his granddaughter, Permelia, \$50 in cash. He gave to his widow all his household goods and kitchen furniture for and during her life, and required his son, William, to pay his debts. No executor qualified, nor was any administrator with the will

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annexed appointed. The widow, Lucretia, died intestate in July, 1885, in possession of the eighty acres of land described in the complaint, leaving her surviving as her sole heirs at law her son, William; her daughter, Malinda Mount; and her granddaughter, Permelia Graves; and leaving no debts to be paid. After the death of the widow, William sold the eighty acres of land described in the complaint to Martha Fielder, who afterwards sold and conveyed the same to John Johnson, this appellant. After appellant bought the land appellees brought this suit for partition, claiming that Lucretia had failed to elect to take under the will of her deceased husband, and therefore as her heirs they were entitled to two-thirds of one-third of the land.

The appellant filed an answer in two paragraphs—one, a general denial; the second, an affirmative answer, averring that James McIver died testate, devising the eighty acres described in the complaint to his widow, Lucretia McIver, for life, with remainder over to William McIver; that Lucretia accepted the provision made for her in the will, and that after the death of Lucretia, William sold and conveyed the eighty acres to Martha Fielder, who, in December, 1886, sold and conveyed the same to Johnson, the appellant.

Appellant also filed a cross-complaint to quiet his title to the eighty acres, and issues were joined on the cross-complaint. The venue was changed to Putnam county. There was a trial, resulting in favor of the appellees. A motion for a new trial was filed and overruled. Exceptions taken to the ruling on the motion present the only error assigned.

The principal question discussed arises on the ruling of the court on the admission of evidence.

The appellees made their *prima facie* case by introducing an admitted statement of facts showing that James McIver died testate, seized in fee of the land described in the complaint, and that he left surviving him his widow Lucretia and the heirs hereinbefore named, and that Lucretia died intestate, and rested their case. There was proof that no claim

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whatever had been filed against the estate of Lucretia, and the statement of facts showed that one Hurley had been appointed administrator of her estate.

The sixth paragraph of the agreed statement of facts is as follows:

"*Sixth.* That Lucretia McIver, widow, never received her statutory allowance of five hundred dollars out of the estate of her husband, James McIver, and after her death, on the 5th day of January, 1885, the plaintiffs caused George D. Hurley to be appointed administrator of her estate for the purpose of procuring said statutory allowance; and that she left no debts."

The appellant offered in evidence a certified transcript of the complete record in a case of George D. Hurley, administrator of the estate of Lucretia McIver, against the appellees, the appellant, and William McIver, to enforce the collection of the statutory allowance of five hundred dollars against the same eighty acres of land described in the complaint in this action. To the complaint of Hurley, administrator, appellant filed an answer, averring the will of James McIver, and alleging that Lucretia, the widow, had elected to accept and take the provision made for her in the will of her deceased husband. To this answer Hurley, administrator, filed a demurrer, which was overruled and an appeal taken, and the judgment affirmed. See *Hurley v. McIver*, 119 Ind. 53. The appellees objected to the introduction of the record, and the court sustained the objection and excluded the evidence, and it is insisted that such ruling is erroneous. It is contended by counsel for appellant that the question involved in this case is as to whether or not the widow, Lucretia, accepted the provisions of the will of her deceased husband, and that the same question was involved in the former case of the administrator for the recovery of the five hundred dollars, and that such question was adjudicated in that case in favor of the appellant; that the appellees were parties to the former ac-

tion, are bound by such adjudication and estopped from again litigating the same in this case.

The former case was an action by the administrator of the estate of Lucretia, the widow of James McIver, to recover the five hundred dollars which it was contended she was entitled to by virtue of the statute, and which had not been paid to her in her lifetime, and to subject to sale for its payment eighty acres of land owned by James McIver in his lifetime. To this action the appellant, Johnson, who had purchased the land, was made a party to answer as to his interest. The appellees were made parties by reason of being the heirs of James McIver. They were sued as heirs. They were called upon to set up any defence they had against the right of the administrator to sell the real estate. The appellant Johnson came into court and answered the complaint of the administrator, setting up a defence which was held valid, and recovered a final judgment in his favor. This set at rest the question involved in the issues joined between the administrator, Hurley, and Johnson, but the appellees, being sued as heirs, were not bound by questions presented by Johnson in his answer to the complaint showing himself to be the owner of the land.

If Johnson desired to bind the appellees, who were his co-defendants in the former action, by the adjudication in that cause, he possibly might have done so by filing a cross-complaint, making them parties to it. Being brought into court by the administrator, as the heirs of James McIver, to answer and set up any defence they might have to the recovery by the administrator of the \$500, and the subjecting of the land to sale for the payment of the same, they were not bound by a defence that Johnson pleaded to the action. They were not called upon to join issue on the facts alleged in Johnson's answer, nor were they called upon in that action to either affirm or deny the truth of the allegations of the answer. The action was not such as to require the joining of any issues between Johnson and the appellees; hence

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they are not estopped by the judgment in that case from asserting title to the land.

It is a well-settled doctrine, that where a party is sued in a particular capacity, he is only bound in the capacity in which he is sued. *Craighead v. Dalton*, 105 Ind. 72, 76, and authorities there cited; *Erwin v. Garner*, 108 Ind. 488; *Jones v. Vert*, 121 Ind. 140.

The court did not err in holding that the record in the former case was not proper evidence.

It is urged that the verdict is not sustained by sufficient evidence, but we think there is sufficient evidence to sustain the verdict. It is suggested that the court erred in refusing to grant a continuance. We have examined the question, and do not think there was any error in this ruling.

Judgment affirmed, with costs.

COFFEY, C. J., took no part in the decision of this cause.
Filed Sept. 18, 1891.

No. 15,119.

REDDICK v. KEESLING.

PLEADING.—Variance.—When Material.—No variance between the allegations in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defence upon the merits. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must be shown in what respect he has been misled. See section 391, R. S. 1881.

RES ADJUDICATA.—Former Action.—Estoppel.—Burden of Proof.—Where there has been an action between the same parties, and it is claimed that the former action is a bar to the present action, the question as to whether the cause of action set up in the complaint in the second action was or was not compromised and settled is an open question to be tried by the court, in the absence of evidence showing a judgment estopping the plaintiff from prosecuting the second action, with the burden of that issue on the defendant.

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SAME.—Special Finding.—Party with Burden of Issue.—Failure to Find for.—
Effect of.—Where the special finding does not show that the claim in suit was settled and compromised between the parties, it must be assumed that no such settlement and compromise was made. A failure to find for a party having the burden of an issue is equivalent to a finding against him.

SAME.—Dismissal of Suit.—Institution of Second Suit.—Return of Consideration Received for Dismissal.—When Unnecessary.—Where a suit was instituted between the same parties and concerning the same subject-matter, and a sum of money was paid by the defendant to the plaintiff, as a consideration for the dismissal of said suit, but was not received by the plaintiff in compromise and settlement of the matters in issue, it was not necessary for the plaintiff to return the money before instituting a second action.

WITNESS.—Incompetency of Surviving Party to a Contract.—Where the plaintiff stands as the representative of her mother, deceased, one of the contracting parties, the defendant, the other contracting party, is not a competent witness to testify as to matters which occurred between him and the defendant during her lifetime, concerning the contract in dispute.

ACTION.—In Whose Name may be Brought.—A person for whose benefit a contract was made, may, in equity, maintain an action thereon in his own name.

JURY.—Case Triable by Court.—Refusal to Require Special Verdict.—Submission of Interrogatories.—Instructions to Jury.—In a case where no right of trial by jury exists, error can not be predicated upon the refusal of the court to require the jury to return a special verdict, or in refusing to submit certain interrogatories to the jury, and in giving, and refusing, certain instructions. The statute, in reference to special verdicts, applies to cases triable by jury, and is not applicable to a case triable by the court alone. So the rules and restrictions under which he will submit a question, as well as the instructions as to the manner of answering the same, are in his discretion.

SPECIAL FINDING.—Intermediate Errors.—When Judgment not Reversed for.—Where the merits of a controversy are to be determined by the special finding of facts in the cause, the judgment of the court below will not be reversed on account of intermediate errors.

From the Henry Circuit Court.

L. P. Newby and M. E. Forkner, for appellant.

J. H. Mellett, J. Brown and W. A. Brown, for appellee.

COFFEY, C. J.—The complaint in this case alleges, among
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other things, that Lucinda Reddick, who was the wife of the appellant, died in the year 1876, leaving her husband and the appellee, an only child, as her only heirs at law; that said Lucinda, during her lifetime, delivered to the appellant eighteen hundred dollars in trust for the appellee, which he agreed to pay over to her, with the legal interest thereon, when she should be competent to receive and receipt for the same; that the appellee became twenty-one years of age in 1885, and demanded of the appellant a settlement of said trust, and the payment of said money to her, which was refused.

The appellant filed an answer to this complaint, consisting of seven paragraphs.

The seventh paragraph of the answer averred, generally, that in October, 1888, a suit was pending in the Henry Circuit Court between the parties to this suit, involving the identical claim now in controversy; that on the 6th day of October, 1888, the parties compromised and settled said claim; that by the terms of said compromise the defendant in this suit agreed to pay the plaintiff the sum of twenty-five dollars, and to give her a horse of the value of one hundred and twenty-five dollars in full settlement of said claim; that said settlement and compromise were fully complied with, and the suit dismissed under a written agreement, executed by the plaintiff, that she would not renew the same.

To this answer the court sustained a demurrer, whereupon the appellant asked and obtained leave to file an additional answer. He then filed additional eighth and ninth paragraphs of answer, which do not differ materially from the above seventh paragraph, except that the eighth states more fully the terms of the alleged compromise and settlement of the claim in suit.

To these last answers the appellee replied that the compromise and agreement to dismiss were obtained by fraud, in the absence of her attorney, setting out the facts, and

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alleging that she had not received anything under the terms of said compromise.

The cause was tried by the court, which referred certain questions of fact to a jury. Upon a return of the answers of the jury to the questions of fact referred to it, the court, upon proper request, made a special finding of facts in the case, and stated its conclusions of law thereon.

Among other things, it appears from the special finding of facts that the appellee is the only child of the appellant and Lucinda Reddick, deceased.

Lucinda died in the year 1876. In the year 1872 she received from her father's estate the sum of seventeen hundred and eighty dollars, six hundred dollars of which was cash, and the remaining eleven hundred and eighty dollars was paid her in notes, which had, prior to that time, been executed by the appellant to the father of the said Lucinda. She paid over the money to her husband, the appellant, and delivered up to him the notes, with the agreement that he should pay over to the appellee the sum of eleven hundred and eighty dollars when she became competent to receive and receipt for the same. At the time of her mother's death the appellee was about ten years of age.

In the year 1888 the appellee instituted an action in the Henry Circuit Court against the appellant on the claim involved in this suit, but before the same was called for trial she procured Alexander Herkless to call upon the appellant and agree with him that she would dismiss the suit if he would pay the costs. Pursuant to such agreement the appellant paid twenty dollars. The money was applied to the payment of costs and to fees due the appellee's attorneys, and the suit was accordingly dismissed.

At the time the money was paid the appellant caused the following agreement to be prepared, viz.: "Oct. 6th, 1888. * * We agree to withdraw the suit now pending at New Castle between Jessie R. Keesling and Fremont Keesling and William Reddick for the present and in all future," and

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sent the same to the appellee, with directions to say that if she would sign it and return it to him he would give her a horse. She did sign it, and returned it by mail, but she never received or accepted the horse. It was signed after the suit was dismissed. The instrument was not intended by the appellee as a settlement of the claim now in suit. Before the commencement of this suit the appellee demanded of the appellant the money for which she sues.

That the appellee could maintain an action in her own name to recover the money left with the appellant by her mother to be paid over to her is too firmly settled by authority to need discussion. It is contended by the appellant, however, without denying this legal principle, that certain errors occurred during the progress of the cause which prevented him from having a fair trial.

We will consider the alleged errors upon which the appellant relies for a reversal of the judgment in the order in which they are presented by his counsel in their able brief in the cause.

First. It is insisted that the finding of the court is not sustained by the evidence in the cause. It is contended, *first*, that there is no proof that any money was left in the hands of the appellant by the mother of the appellee in trust for the latter; and, *second*, that there is a material variance between the allegations in the complaint and the evidence in the cause.

The evidence tends to show that the mother of the appellee received as her distributive share of her father's estate about eighteen hundred dollars. Of this sum the appellant received eleven hundred and eighty dollars by way of the payment of a note due from him to the estate. The evidence further tends to show that appellant repeatedly acknowledged a liability to the appellee on account of this money, said he was keeping it for her, and promised to settle with her when he could sell his farm.

From these facts the conclusion that he held the money in

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trust for the appellee is not wholly unwarranted. There is some evidence tending to support the finding of the court, and under the well known rules we are not at liberty to interfere with such finding.

It is urged by the appellant that the evidence tends to show that there was no money left in the hands of the appellant, but that if anything was left with him it was a promissory note, and proof that a promissory note was left with him does not support the allegation that it was money.

The court was authorized to find from the evidence in the cause that the appellee's mother paid a note due from the appellant to her father's estate and surrendered the note to him. If so, it may well be said that she left the money due on the note in the hands of the appellant. At least the variance, if any existed, was not material.

Section 391, R. S. 1881, provides that "No variance between the allegations in a pleading and the proof is to be deemed material, unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defence upon the merits. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must be shown in what respect he has been misled; and thereupon the court may order the pleading to be amended on such terms as may be just."

It is not claimed that the appellant was in any way misled by the alleged variance in this cause, or that he was prejudiced in his defence, and under the terms of the statute such variance, assuming that it exists, must be held to be immaterial. *Ashton v. Shepherd*, 120 Ind. 69.

Second. It is contended by the appellant that the court erred in its conclusions of law upon the facts as stated in the special finding.

In this connection it is contended, *first*, that the dismissal of the action pending in the Henry Circuit Court between the parties to this suit, by agreement, is a bar to another action for the same cause; and, *second*, that in no event could

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the appellee maintain an action without first tendering back to the appellant the twenty dollars paid on the agreement to dismiss the action then pending.

The weight of authority seems to support the position that the dismissal of an action pending, by agreement, followed by a judgment of the court, is a bar to another action for the same cause, unless the judgment is modified by some statement in the judgment itself. It is virtually an acknowledgment by the plaintiff, in open court, that he has no further cause of action against the defendant. Black Judgments, section 706; Freeman Judgments (3d ed.), section 262.

In such cases it is the judgment of the court that bars the right, creating an estoppel by record.

In this case we are not advised of the nature of the judgment rendered by the court on the dismissal of the former action between these parties. The judgment may be one, so far as we can ascertain from the record before us, showing a dismissal by the plaintiff without any agreement. Indeed, it is disclosed by the evidence in the cause that the action was dismissed by the plaintiff in vacation under our statute authorizing such dismissals.

Without the record before us, or some finding disclosing its contents, we can not say that it estops the appellee from prosecuting this action. In the absence of a judgment estopping the appellee from prosecuting this action, the question as to whether the cause of action set up in the complaint in this case was, or was not, compromised and settled, was, on the trial, an open question of fact, to be tried by the court, with the burden of that issue on the appellant. As the special finding does not show that the claim in suit was settled and compromised between the parties, we must assume that no such settlement and compromise was made. A failure to find for a party having the burden of an issue is equivalent to a finding against him. *Talbert v. Berkshire L. Ins. Co.*, 80 Ind. 434; *Hunt v. Blanton*, 89 Ind. 38; *Stix*

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v. *Sadler*, 109 Ind. 254; *Sinker, Davis & Co. v. Green*, 113 Ind. 264; *Meeker v. Shanks*, 112 Ind. 207.

If the payment of the twenty dollars mentioned in the finding was not made on settlement of the claim in suit, but was paid as a consideration of the termination of their suit then pending, as contended by the appellee, it was not necessary to return it before the commencement of this action. The appellant received all he contracted for.

Third. It is contended by the appellant that the court erred in refusing to allow him to testify to matters that occurred between him and his wife, Lucinda, prior to the time of her death.

It is contended by the appellant that, inasmuch as the appellee does not sue as heir, but seeks to avail herself of a contract made with her ancestor, for her benefit, the statute does not exclude him from testifying in the cause, and that he had the legal right to testify to all that occurred between him and his wife in relation to the money which the appellee seeks to recover in this action.

To solve the question here presented it is necessary to inquire into the relation sustained by the appellee to the contract set up in the complaint. At law the appellee could not maintain this action, because there is no privity. *Salmon v. Brown*, 6 Blackf. 347; *Farlow v. Kemp*, 7 Blackf. 544; *Britzell v. Fryberger*, 2 Ind. 176; *Conklin v. Smith*, 7 Ind. 107.

But equity subrogates the appellee to the rights of her mother in the contract made with the appellant, and it has always been the rule that the person for whose benefit a contract was made might, in equity, maintain an action thereon in his own name. *Miller v. Billingsly*, 41 Ind. 489.

The appellee, therefore, stands as the representative of her mother, seeking to enforce a contract made with the mother for her benefit.

The true interpretation of our statute upon the subject of the competency of witnesses, was rendered in the case of

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Taylor v. Duesterberg, 109 Ind. 165, in which the court said: "The true spirit of the statute seems to be, that when a party to a subject-matter or contract, in action, is dead, and his rights in the thing or contract have passed to another who represents him in the action or proceeding which involves such contract or subject-matter, to which the deceased was a party, the surviving party to that subject shall not testify to matters occurring during the lifetime of the decedent."

As the mouth of the mother, one of the contracting parties, was closed by death, we think the law closed the mouth of the father, the other contracting party, and that the court did not err in refusing to allow him to testify regarding the matters to which he was offered as a witness.

Fourth. It is contended by the appellant that the court erred in refusing to require the jury to return a special verdict, in refusing to submit certain interrogatories to the jury, and in giving, and refusing, certain instructions.

In a case like this, where no right of trial by jury exists, these are matters of which error can not be predicated. A jury is called in such cases, in the discretion of the judge, to advise him upon questions of fact. The statute, upon the subject of special verdicts, applies to cases triable by jury, and is not applicable to a case triable by the court alone.

The finding of a jury upon controverted questions of fact would no doubt have great weight with the court, but it may, nevertheless, wholly ignore any finding the jury may make. The judge must ultimately determine for himself all the questions of fact in the case. He may submit one or more questions of fact to the jury for his information, but what questions he will submit must, of necessity, be determined by himself. So the rules and restrictions under which he will submit a question, as well as the instructions as to the manner of answering the same, are in his discretion; he alone being responsible for the correct determination of the

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questions of law and fact upon the final hearing of the cause. *Sheets v. Bray*, 125 Ind. 33.

Fifth. It is finally contended that the court erred in sustaining the appellee's demurrer to the seventh paragraph of the appellant's answer, and in overruling the appellant's demurrer to the second paragraph of the appellee's reply.

We have not found it necessary to examine into the question as to whether the court erred in these rulings. All the evidence which could have been admitted under the seventh paragraph of the answer, to which the court sustained a demurrer, was admissible under the eighth and ninth paragraphs of answer subsequently filed by the appellant. But it is shown by the special finding of facts that neither of these answers, nor the reply in question, is true in fact.

The merits of the controversy are to be determined by the special finding of facts in the cause, and in such cases the judgment of the court below will not be reversed on account of intermediate errors. *Martin v. Cauble*, 72 Ind. 67; *State, ex rel., v. Vogel*, 117 Ind. 188.

Some other questions of minor importance in the case have been discussed by counsel, which need not be set out here. It is sufficient to say that we have given them a careful consideration, and find in them no error.

Judgment affirmed.

Filed Sept. 18, 1891.

 No. 14,906.

DUKES v. COLE ET AL.

PLEADING.—Sufficiency of Answer.—Reply.—The Supreme Court will not look beyond the allegations of an answer, to the reply, for the purpose of determining its sufficiency.

SAME.—Exhibits.—*When Part of Pleading.*—Exhibits are to be considered as a part of a pleading only in cases where they are copies of the instrument upon which the pleading is founded.

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PRACTICE.—*Assignment of Error.—Failure to Make Specific Objection.*—Where it is assigned as error that the court erred in rendering judgment upon a demurrer, but no specific objection was made thereto, and no exception was taken, the judgment will not be disturbed.

From the Miami Circuit Court.

J. M. Brown, N. N. Antrim and J. L. Farrar, for appellant.

R. P. Effinger, C. A. Cole and S. T. McConnell, for appellees.

ELLIOTT, J.—The appellant alleges in his complaint that by a contract in writing the appellees sold to him a large number of growing trees; that he cut down the trees and sawed them into logs and cordwood; that, after this was done by him, the appellees seized the logs and cordwood and converted them to their own use.

The appellant has not made good any point on the answers pleading a former recovery, for no specific defects are designated. We can not say that the answers are bad, for, while they are not well drawn, they are sufficient in substance to require us to uphold the judgment of the trial court. In discussing the sufficiency of the answers counsel refer us to exhibits filed with the reply, but we can not look beyond the allegations of the answers for the purpose of determining their sufficiency. If, however, it were true that we could look beyond the answers, to the reply, we could not regard the exhibits, for they are not parts of the pleading. It has been often decided that exhibits are only to be considered as a part of a pleading in cases where they are copies of the instrument upon which the pleading is founded.

It is specified in the assignment of errors that the court erred "in rendering judgment for the defendants on the demurrer to the second paragraph of the reply." Waiving a decision of the question whether this is a proper specification of error, we hold against the appellant, for the reason that there was no specific objection to the judgment, nor was there

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any exception. If the specification had been upon the ruling on the demurrer to the reply a very different question would be presented.

Judgment affirmed.

Filed Sept. 24, 1891.

No. 14,758.

SCHISSEL v. DICKSON ET AL.

JUDGMENT.—*Defective Summons.—Collateral Attack.*—A judgment upon a complaint against Wesley W. Hilton and — Hilton, where summons is served by notice of publication addressed to Wesley W. Hilton and — Hilton (whose first name is alleged to be unknown), is not binding upon William W. Hilton and Cora B. Hilton, and may be collaterally attacked.

PARTITION.—*Action for.—Tax Lien Held by Co-Tenant.—Necessity of Tender.*

—The owner of an undivided interest in land may maintain an action for partition against his co-tenant in common, notwithstanding the tenant in common holds a valid tax lien upon such undivided interest. The lien in such cases attaches to the part set off to the lien debtor when partition is complete, and in such a case no tender of the amount of the lien is necessary.

SAME.—*Action for.—Joinder with Action to Quiet Title.—Tax Lien.—Decree.*

—*Practice.*—Plaintiff in a suit for partition against the holder of a tax lien joined in the same suit a cause of action to quiet title to the same land, but made no tender of the amount necessary to discharge the tax lien, as required in an action to quiet title against the holder of a tax lien. The court found that the plaintiff was the owner in fee of the undivided two-thirds of the land, and tenant in common with the defendant, who was the owner in fee of the remaining one-third, but that plaintiff's interest was subject to a valid tax lien in favor of the defendant. The court awarded plaintiff partition, but did not quiet plaintiff's title, holding that the lien attached to the severed interest, and providing by the decree for its satisfaction from the partition sale ordered.

Held, proper proceeding.

TAXES.—*Tax Sale.—Redemption.—Persons Under Disability.—Penalty and Interest.—Statute.*—Under section 208 of the general tax law of 1872 (1

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| 129 | 139 |
| 134 | 430 |
| 136 | 491 |
| 129 | 139 |
| 143 | 46 |
| 143 | 83 |
| 129 | 139 |
| 147 | 156 |
| 129 | 139 |
| 148 | 665 |
| 129 | 139 |
| 164 | 93 |
| 129 | 139 |
| 170 | 314 |

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Davis Stat. 121), all persons might redeem within two years after the sale on the payment of fifty per cent. penalty and six per cent. interest. Under the tax law of 1872, where the delinquent was an infant when the tax sale was made, he was properly chargeable with fifty per cent. penalty and six per cent. interest from the date of each payment. By section 210 of the statute, extending the time for redemption to two years after the disability was removed, it is intended that persons under disability may, within that time, redeem on the same terms as other persons were allowed to redeem before the expiration of the two years.

SAME.—Payment of City Taxes to Protect Lien.—Penalty and Interest.—By section 251 of the general tax law of 1872 (1 Davis Stat. 127) the holder of a lien on lands was authorized to pay taxes on such lands, and by the act of March 11th, 1875 (1 Davis Stat., p. 338), this provision also became applicable to city taxes. The purchaser at a sale for State and county taxes, who pays city taxes to protect his lien, is entitled to the same penalty and interest on them as on the State and county taxes.

SAME.—Proper Parties.—Property not Divisible.—Sale.—In a suit for partition of land in this State, all persons holding liens or claims upon it are proper parties, and the court has power to hear and adjust all the equities between them; and when the property is not divisible, to order a sale and distribution of the proceeds according to the rights of the several parties, and a party holding either a legal or an equitable title may institute the proceedings.

TENANTS IN COMMON.—Tax Lien.—Rents.—Accounting.—One who has a tax lien on land owned by him and another as co-tenants, must account to his co-tenant for rents received from renting the property.

From the Marion Superior Court.

H. J. Milligan, for appellant.

R. O. Hawkins, for appellees.

McBRIDE, J.—This was a suit for the partition of land. There was a trial by the court, a special finding of facts, and conclusions of law stated thereon.

The case comes to us on exceptions to the conclusions of law. The facts, as found by the court, are substantially as follows:

In the fall of 1868 one Mary J. Hilton died intestate in the city of Indianapolis, seized in fee simple of certain real estate in that city—the property in controversy herein. She left surviving her as her sole heirs, her husband, William W. Hilton, and an infant daughter, Cora B. Hilton, who was

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born July 12th, 1865. The daughter, on the 21st day of April, 1886, intermarried with one Simeon Dickson, and she and her husband are the appellees in this case.

In the year 1875 said William W. Hilton, with his said infant daughter, removed to the State of Illinois, where they have ever since resided, and still reside.

The county and State taxes on said real estate for the years 1873 and 1874 were allowed to become delinquent, and in February, 1875, the property was offered for sale at public sale to pay the same. It did not sell, and, July 31st, 1875, the auditor of Marion county sold it at private sale to one Frank McWhinney for \$44.97, the amount of the taxes. McWhinney afterward paid the county and State taxes for the years 1875 and 1876, amounting to \$12.80 and \$12.85 respectively; and, there being no redemption from the sale, the auditor made him a deed on the 12th day of February, 1877.

August 12th, 1879, the city taxes on the property being delinquent in the sum of \$257.84, the city treasurer sold it to McWhinney at private sale for that sum, and gave him a certificate of purchase.

September 5th, 1879, McWhinney commenced suit in the superior court of Marion county to quiet his title to the property, making defendants thereto *Wesley W. Hilton*, ——— Hilton (whose first name he alleged was unknown), Henry H. Moore and Emeline Moore. No process was ever served in said cause on either William W. Hilton, or on the appellee Cora B. Dickson, *nee* Hilton, nor did either of them ever appear to said action either in person or by attorney.

An affidavit was filed in the following words:

"State of Indiana, Marion County, ss.:

"Frank McWhinney vs. Wesley W. Hilton, ——— Hilton, Henry Moore, ——— Moore, his wife.

"The undersigned, being duly sworn, upon his oath says that he has been informed by Mr. Samuel Showalter, who says he is the agent for Wesley W. Hilton and ——— Hilton (whose first name is unknown to this affiant), and that

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he, Showalter, is their agent for the purpose of renting and collecting rent of lot forty (40) in out-lot one hundred and sixty-one, in Indianapolis, Marion county, Indiana, and also informed affiant that said Hiltons both are non-residents of the State of Indiana, and have their residence in the State of Illinois. Wherefore they can not be served with summons in the State of Indiana, as the affiant verily believes.

"J. T. LECKLIDER.

"Subscribed and sworn to before me this 5th day of September, 1879. DANIEL M. RANSEDELL, Clerk."

On this affidavit there was publication of notice as to Wesley W. Hilton and ——— Hilton.

The case came on for hearing at the November term, 1879, of the court, and was tried by the court without a jury. There was a finding of publication of notice as to the Hiltons, and a default of Wesley W. Hilton. A guardian *ad litem* was appointed for ——— Hilton, and Moore and wife appeared and answered. The guardian *ad litem* filed an answer for ——— Hilton.

The court made a general finding that the tax deed and tax certificate were insufficient to carry title, but were sufficient to, and did, give McWhinney a lien on the premises for all taxes and charges thereon paid by him, amounting to \$491.65, including penalty and interest, which sum he was entitled to recover, and that ——— Hilton was the owner in fee simple of the undivided two-thirds of the property, subject to its share of said \$496.65, and that Henry H. Moore was the owner of the undivided one-third of the property, subject to its share of said sum.

The court thereupon ordered said ——— Hilton and said Moore to pay said sum into court within twenty days, together with all costs in the case, for the use of McWhinney.

There was a further decree foreclosing the lien, and ordering that in default of such payment the premises be sold by the sheriff of Marion county as on execution, without relief from valuation or appraisement laws, and without right

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of redemption, and that on such sale being made a deed or deeds be at once executed to the purchaser, or purchasers. The decree was rendered December 20th, 1879, and on the 24th day of January, 1880, the property was sold by the sheriff. Moore bought the undivided one-third for \$182.23, and McWhinney bought the undivided two-thirds for \$364.46. On the same date Moore conveyed his interest to McWhinney.

January 31st, 1880, McWhinney and wife conveyed to one Lindley Vinton, and Vinton and wife conveyed to the appellant on the 4th day of November, 1881. Since that date the appellant has been in possession, claiming to be the owner of the entire premises.

During that time he has collected rents amounting to \$674, and has paid for taxes and repairs upon the property \$225, of which \$93.96 was for repairs, and \$131.05 was for taxes. McWhinney also paid the following additional taxes: City taxes, 1879, \$9.60; 1880, \$13.60, and 1881, 12.35; county taxes, 1879, \$7.20; 1880, \$7.84.

The court also found that the premises were indivisible without injury to the owners.

The court thereupon stated its conclusions of law, holding: That in the case of McWhinney *vs.* Hilton, the Marion Superior Court acquired no jurisdiction of the appellee Cora B. Dickson, and that she was not bound by the decree in that case, but remained and is the owner of the undivided two-thirds of the property, subject to the said liens and equities of the appellant.

That the decree and sale in that case were effectual to divest the title of William W. Hilton to the undivided one-third of the property, and that thereby and through the subsequent conveyances the appellant became and is the owner of such interest therein, and that he in the same manner succeeded to all the liens and equities of his immediate and remote grantors; that the tax-sale of August 28, 1879, by the officers of the city of Indianapolis to McWhinney was void and

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transferred neither title nor lien, but that by virtue of his prior purchase, July 31st, 1875, for State and county taxes, McWhinney had acquired such an interest in the property that he had a right to pay said city taxes, and by virtue of such payment to have and hold a lien on such real estate for his reimbursement, the one-third interest which he afterward acquired therein being chargeable with one-third of the amount paid, and appellee's two-thirds being chargeable with the residue; that as to all the State and county taxes paid by McWhinney before January 24th, 1890, when he acquired title to the undivided one-third of the property, appellee was entitled to redeem, according to the provisions of the tax law, approved December 21st, 1872, by paying two-thirds of the sum total of such taxes, with 50 per cent. penalty thereon, and 6 per cent. interest on each payment from the respective dates thereof.

That appellee is not chargeable with any penalty or interest on the amount paid at the sale for city taxes, nor with any penalty or interest on any taxes whatever paid since January 24th, 1880.

That after January 24th, 1880; McWhinney, and those claiming under him, were tenants in common with the appellee in the property, and as such were each liable to contribute according to their respective interests to the sums paid for taxes and repairs on the property, and were each entitled to share according to such interest in rents received for the same, and that on an accounting the tenant in common paying such taxes and repairs was entitled to a lien upon the share of the co-tenants to secure his reimbursement.

That the appellee was not bound to make any tender to the appellant before instituting suit, for the reason that the amount, if any, due to the appellant could only be ascertained by an accounting, all the data for which were in the possession and knowledge of the appellant, who denied that the appellee had any interest in the property.

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The court, upon the foregoing basis, stated the account between the appellant and the appellee as follows:

"The defendant aforesaid" (the appellant), "and those through whom he claims, have paid the amounts following, viz.:

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| State and county taxes paid by said McWhinney, | |
| July 31st, 1875 | \$44 97 |
| Total State and county taxes paid since July 31st, | |
| 1875, and prior to 24th of January, 1880 | 32 85 |
| City taxes paid by McWhinney since August 28th, | |
| 1879, and prior to 24th of January, 1880 | 9 60 |
| Penalty of fifty per cent. on above | 43 71 |
| Interest on the above payments at the rate of six | |
| per cent. per annum from dates of respective pay- | |
| ments | 68 00 |
| City taxes paid by McWhinney at city tax sale Au- | |
| gust 28th, 1879 | 257 84 |
| State and county taxes paid since January 24th, | |
| 1880 | 7 80 |
| City taxes paid since January 24th, 1880 | 25 95 |
| Taxes paid by defendant | 131 05 |
| Repairs made by defendant | 93 96 |

Total \$715 73"

The court thereupon charged the appellant with rents collected by him in the sum of \$674.

These sums were apportioned, two-thirds to the appellee and one-third to the appellant, leaving a balance due to the appellant of \$27.83, for which sum it was held that the appellant was entitled to have a lien on the undivided two-thirds of said property belonging to the appellee.

Exceptions were duly taken to the conclusions of law.

The court rendered a decree adjudging that the appellant was the owner in fee simple of the undivided one-third, and that the appellee was the owner in fee of the undivided two-

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thirds of the property in controversy ; that the interest of the appellee was subject to a lien in appellant's favor for said sum of \$27.83, and that the property could not be divided without injury, etc.

A sale was ordered, the proceeds to be divided, one-third to the appellant and two-thirds to the appellee, after the payment of the costs and of said sum of \$27.83, which latter sum was to be paid from the two-thirds due to the appellee.

The appellant challenges the correctness of the conclusions of law upon the following propositions :

1st. As to the effect of the decree of foreclosure in the case of *McWhinney vs. Hilton et al.*, in the Marion Superior Court, of which counsel says : " The judgment of foreclosure against plaintiff will withstand a collateral attack, and is *prima facie* correct."

2d. That the appellee could maintain the action without first tendering to the appellant the amount due him, the appellant insisting that such tender was necessary.

3d. As to the amount due the appellant for which he is entitled to a lien, appellant insisting that " The defendant is entitled to interest and penalty and damages on the \$257.84 of city taxes paid in 1879, at the same rate as on the other amounts paid."

4th. That the appellant was liable to account for rents, appellant denying such liability ; and,

5th. The method of computing the sum due to appellant, of which counsel says : " The damages due defendant is the amount of purchase-money of tax sales, and amounts subsequently paid for taxes, with 20 per cent. per annum from respective dates of sales and payments."

We will consider these questions in the order in which they are presented by the appellant.

1st. The attack on the decree in *McWhinney vs. Hilton et al.*, is unquestionably collateral, and can only succeed if the decree is void as to the person making the attack. A judgment is void if the court rendering it had no jurisdiction of

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the subject-matter. It is not, however, necessarily void because the court did not have rightful jurisdiction of the person against whom it is rendered. If there has been service of process, although irregular, but which the court adjudges regular and sufficient, the judgment rendered is not void, and although it may be set aside in a direct proceeding for that purpose, it will withstand collateral attack.

The affidavit upon which publication was made was radically defective and insufficient, yet one of the questions upon which the court was required to pass was the sufficiency of the affidavit, and whether or not in fact the service by publication on the parties named in the affidavit and notice was sufficient to give the court jurisdiction of their persons.

So far as the questions thus decided may be brought in question collaterally, that decision, though erroneous, is conclusive upon the parties. *Quarl v. Abbott*, 102 Ind. 233; *Field v. Malone*, 102 Ind. 251; *Pickering v. State, etc.*, 106 Ind. 228; *Kleyla v. Haskett*, 112 Ind. 515; *Essig v. Lower*, 120 Ind. 239; *Goodell v. Starr*, 127 Ind. 198.

It is, however, only parties to judgments, and those who are in privity with them, who are thus bound. In this case it can not be said that either William W. Hilton or Cora B. Hilton was a party to that action.

If a complaint stating a cause of action against *Wesley W. Hilton*, and constructive service by the publication of notice addressed to *Wesley W. Hilton* is sufficient to bring into court and bind *William W. Hilton* by the decree rendered, he can be as well thus bound by a complaint and notice against *John Hilton*, or *John Doe*; and if a complaint stating a cause of action against ——— *Hilton*, with constructive service by the publication of a notice addressed to ——— *Hilton*, without other description or identification, will suffice to bring into court and bind *Cora B. Hilton* by the decree rendered, it will be equally efficacious as against all persons named *Hilton*.

So far as this case is concerned, no question is made on the

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interest of William W. Hilton, and it is unnecessary to pass upon the effect of that decree upon his interest, further than to suggest that by acquiescing in the decision of the court below in this case, he has probably set at rest any question that might otherwise have been raised. In our opinion Cora B. Dickson was in no manner affected by the decree in the case of *McWhinney vs. Hilton et al.* She was not a party to it, and whatever rights or interests she had in the property in controversy are no more affected by it than if there had been no such proceeding. As to her it is void. *Grigsby v. Akin*, 128 Ind. 591.

2d. Was the tender by the appellee of the sum due to the appellant a pre-requisite to the commencement and maintenance of the action by her?

The owner of land which is subject to a valid tax lien can not maintain an action against the holder of the lien to quiet title, without first tendering the amount necessary to discharge it. *Ethel v. Batchelder*, 90 Ind. 520; *Lancaster v. Du Hadway*, 97 Ind. 565; *Peckham v. Millikan*, 99 Ind. 352; *Rowe v. Peabody*, 102 Ind. 198.

The owner of an undivided interest in land may, however, maintain an action for partition against his co-tenant in common, notwithstanding the tenant in common holds a valid tax lien upon such undivided interest. The lien in such cases attaches to the part set off to the lien debtor when partition is complete, and in such a case no tender of the amount of the lien is necessary.

The plaintiff in a suit for partition of land may join in the same suit a cause of action to quiet the title to the same land. R. S. 1881, section 278, subdivision 5.

The evidence may show him entitled to partition, but not to a decree quieting his title.

In such case the fact that he can not have his title quieted will not necessarily affect his right to partition. He may recover on one issue and fail on the other.

In the case at bar the appellee asked for partition of the

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land in controversy, and that her title thereto be quieted. The court found that she was the owner in fee of the undivided two-thirds of the land, and tenant in common with the appellant, who was the owner in fee of the remaining one-third, but that her interest was subject to a valid tax lien in favor of the appellant. The court rightfully awarded her partition, but did not quiet her title, holding, on the contrary, in effect at least, that the lien attached to the severed interest, and providing by the decree for its satisfaction from the proceeds of the partition sale ordered. This was proper procedure.

In a suit for partition of land in this State, all persons holding liens or claims upon it are proper parties, and the court has power to hear and adjust all the equities between them; and when the property is not divisible, to order a sale and distribution of the proceeds according to the rights of the several parties, and a party holding either a legal or an equitable title may institute the proceedings. *Milligan v. Poole*, 35 Ind. 64; *Schee v. McQuilken*, 59 Ind. 269; *Cravens v. Kitts*, 64 Ind. 581; *Clark v. Stephenson*, 73 Ind. 489.

3d. Was the appellant entitled to interest, penalty and damages on the \$257.84 of city taxes paid by him in 1879?

This we will consider in connection with appellant's fifth contention that the court erred in computing the sum due to appellant.

The rights of the parties must be determined by reference to the general tax law of December 21st, 1872, which, by the act of March 11th, 1875, 1 Davis Statutes (1876), p. 338 (see section 3263, R. S. 1881), is made applicable to cities and towns.

The latter act was considered in the case of *Barton v. McWhinney*, 85 Ind. 481, and held valid, and it was also there held that by virtue of its provisions sales of lands by city treasurers for delinquent taxes, together with penalties, etc., were governed by the general tax law. See, also, *Millikan v. Ham*, 104 Ind. 498, and *Jones v. Foley*, 121 Ind. 180.

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The court below evidently acted on the assumption that the general tax law governed so far as the State and county taxes were concerned, and computed penalty and interest in accordance with its provisions.

Section 208 of that law (1 Davis Stat. 121) provides that "The owner or occupant of any land sold for taxes, or any other person, may redeem the same at any time within two years after the last day of such sale, by paying to the county treasurer, for the use of the purchaser, his heirs or assigns, the sum mentioned in his certificate, and the amount of all subsequent taxes paid, with fifty per centum on the whole sum, and interest from the date of purchase or from the time of payment."

Section 210 provides that "Infants, idiots, *femmes covert*, and insane persons may redeem any lands belonging to them, sold for taxes, within two years after the expiration of such disability."

The appellee was an infant when both tax sales were made, and this suit was commenced within the time allowed her by section 210, *supra*, for redemption. The court, in our opinion, correctly charged against her in the accounting fifty per cent. penalty on the State and county taxes, and computed interest thereon at the rate of six per cent. per annum from the date of each payment.

Sections 256 and 257 (1 Davis Stat. 129, and sections 2 and 3 of act of March 5th, 1883—Acts of 1883, p. 95), do not apply.

These sections are applicable when the time for redemption has expired. Under section 208, *supra*, all persons might redeem within two years after the sale on the payment of fifty per cent. penalty and six per cent. interest. After that time if the conveyance proved ineffectual to convey title, all not under the disabilities named in section 210 were chargeable with interest under the act of 1872, at twenty-five per cent., and under that of 1883 at twenty per cent. per annum. It is evident, however, that as to those under the

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disabilities named in section 210, *supra*, the Legislature, in extending the time for redemption to two years after the disability was removed, intended that they might, within that time, redeem on the same terms as other persons were allowed to redeem before the expiration of the two years. To suppose otherwise would be to suppose that the Legislature intended to impose on the weak and those needing protection heavier burdens than on those able to take care of themselves.

In the case of *Lancaster v. Du Hadway*, 97 Ind. 565, BEST, Commissioner, speaking for the court, says of section 208, *supra*, and section 222 of the same act: "The first section enables all persons, whether laboring under disabilities or not, to redeem from such sales within two years, and the last requires the auditor to execute a deed, at the expiration of such time, for all land sold for taxes, notwithstanding the fact that the owner may be an infant.

"It is true, that such persons are not required to redeem within such time, but may do so at any time within two years after the removal of their disability. * * The right to redeem may be exercised by such persons after the execution of a deed."

The right to redeem thus given by the statute means the right to redeem upon the same terms accorded to other persons.

We think the court erred, however, in distinguishing between the State and county taxes and the city taxes. The same rule which applies to one applies to the other. The lien of taxes levied by the city is of equal rank and priority with the lien of those levied for State and county purposes. *Justice v. City of Logansport*, 101 Ind. 326.

By section 251 of the general tax law of 1872 (1 Davis Stat. 127) the holder of a lien on lands was authorized to pay taxes on such lands, and by the act of March 11th, 1875, heretofore cited, this provision also became applicable to city taxes. Even in the absence of such statutory provision the holder of a tax certificate, who to protect his interest as such

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pays valid taxes levied on the property, is not a volunteer, and is entitled to protection. *Harlan v. Jones*, 104 Ind. 167.

In addition to this the statutes providing for redemption from tax sales as well as the several provisions relative to the foreclosure and enforcement of the lien when the conveyance proves ineffectual to convey the title, recognize such right, and provide in express terms that penalties shall be added and interest computed on taxes paid after the sale.

It is not material whether the court erred or not in holding that the sale for city taxes did not transfer to McWhinney the tax lien. As purchaser at the previous sale by the auditor, and holder of the auditor's deed, he had the right to pay them, and should be allowed the same penalty and interest on them as on the State and county taxes.

The only question remaining is, was the appellant liable to account for rents received by him after the 24th day of January, 1880?

On that day he acquired title to the undivided one-third of the property, and became tenant in common therein with the appellee, and thereafter he alone collected the rents and applied them to his own use, claiming to own the entire premises.

Section 288, R. S. 1881, provides that "A joint tenant, or tenant in common, or tenant in coparcenary, may maintain an action against his co-tenant or coparcener, or their personal representatives, for receiving more than his just proportion."

This is substantially the statute of Anne, and has long been the law in this State. It applies when a tenant in common receives rent from a third party and applies it to his own use. *Crane v. Waggoner*, 27 Ind. 52.

The court did not err in requiring appellant to account for rents received by him.

For the error of the court in not allowing penalty and interest on the city taxes at the same rate allowed on the State and county taxes the cause is reversed, at the costs of the appellees, and the Marion Superior Court is directed to

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restate its conclusions of law in accordance with this opinion, and to render judgment accordingly.

Filed Sept. 24, 1891.

No. 15,911.

THE STATE v. WHITE.

CRIMINAL LAW.—Grand Larceny.—Indictment.—Sufficiency of.—Surplusage.—Repugnant Allegations.—An indictment for grand larceny is sufficient which, after omitting the surplus and repugnant matter contained therein, charges the defendant with feloniously stealing, taking and carrying away the personal goods of another, of the value of twenty-five dollars or upwards. Under our statute no indictment shall be quashed “for any surplusage, or repugnant allegations, where there is sufficient matter alleged to indicate the crime and person charged.” See section 1756, R. S. 1881, subdivision 6.

From the Jay Circuit Court.

A. G. Smith, Attorney General, and R. H. Hartford, Prosecuting Attorney, for the State.

J. J. M. La Follette and O. H. Adair, for appellee.

OLDS, J.—The appellee was indicted for grand larceny. There was a motion made to quash the indictment, and sustained, and this ruling is assigned as error.

Omitting the formal averments of the indictment, it reads as follows: “That one Cassius I. White, late of said county, on the 13th day of March, 1888, at said county and State aforesaid, did then and there fraudulently and feloniously, without then and there having the consent of Adelma Lupton, embezzle and convert to his own use twenty-three head of cattle, of the value of eight hundred and seventy-three dollars and ninety-five cents, then and there delivered to the said Cassius I. White by the said Adelma Lupton, by then and there fraudulently and feloniously stealing, tak-

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| 129 | 153 |
| 145 | 178 |
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ing, and carrying away said cattle, the property of the said Adelma Lupton, from him, contrary," etc.

The statute, section 1933, R. S. 1881, provides that "Whoever feloniously steals, takes and carries, leads, or drives away the personal goods of another, of the value of twenty-five dollars or upwards, is guilty of grand larceny." The sixth subdivision of section 1756, R. S. 1881, declares that no indictment shall be quashed "for any surplusage, or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged." The question to determine is whether, by the omission of all surplus and repugnant matter in the indictment, there still remain sufficient allegations "to indicate the crime and person charged." Omitting the surplus and repugnant matter, this indictment may be read as follows: The grand jury charge and present "that one Cassius I. White, late of said county, on the 13th day of March, 1888, at said county and State aforesaid, did then and there twenty-three head of cattle, of the value of eight hundred and seventy-three dollars and ninety-five cents, the property of the said Adelma Lupton, feloniously steal, take, and carry away."

It will be seen that this indictment charges the appellee with feloniously stealing, taking, and carrying away twenty-three head of cattle, of the value of \$873.95, the property of Adelma Lupton. Omitting the surplus and repugnant matter, it alleges sufficient to indicate the crime and person charged substantially in the language of the statute defining the crime of grand larceny. It is true, the indictment is very awkwardly and badly drafted, and such form of pleading should not be encouraged by the courts; but it must be construed by giving due regard to the provisions of section 1756, *supra*; and by doing so the indictment is sufficient, and it was error to sustain a motion to quash it. *Feigel v. State*, 85 Ind. 580; *Myers v. State*, 101 Ind. 379.

It was the purpose of the statute to do away, as far as practicable, with technicalities in criminal pleading.

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Judgment reversed, with instructions to the circuit court to overrule the motion to quash the indictment.

Filed Sept. 23, 1891.

No. 15,920.

MERRITT ET AL. v. GIBSON ET AL.

MORTGAGE.—Foreclosure.—Inadequacy of Security.—Rents and Profits During Year for Redemption.—Receiver.—Where lands are sold at a mortgage foreclosure sale, and the mortgage creditor is the purchaser, if he shows that the mortgaged lands are inadequate to secure the debt, that the debtor is insolvent, and that the lands, or a material part of them, are in the actual occupancy of tenants who are to pay rent therefor by a share of such crops as they raise thereon, or otherwise, a court of equity may appoint a receiver to collect the rents and profits accruing from that portion of such lands as are occupied by tenants, and hold them to the expiration of the year allowed for redemption, subject to the order of the court, to be paid to the debtor, if he redeems, or to the mortgage creditor, if the debtor does not redeem. Elliott, J., and Miller, J., dissent.

SAME.—Redemption.—Receiver.—Statutes.—For a consideration of section 767, R. S. 1881, providing for the redemption of lands from judicial sales, and clause seven of section 1222, R. S. 1881, relating to the appointment of receivers during the time allowed for redemption, see opinion.

From the Switzerland Circuit Court.

C. E. Walker, for appellants.

F. M. Griffith, W. D. Ward and J. A. Vanosdol, for appellees.

MCBRIDE, J.—The question we are required to decide in this case is: When a mortgage on land has been foreclosed, and the mortgaged land sold to the mortgage creditor on the decretal order, is he entitled, as against the owner of the equity of redemption, to the appointment of a receiver to take

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| 129 | 185 |
| 132 | 209 |
| 129 | 155 |
| 139 | 474 |
| 129 | 155 |
| 146 | 269 |
| 129 | 155 |
| 151 | 632 |
| 151 | 634 |
| 151 | 635 |
| 151 | 636 |
| 129 | 155 |
| 159 | 555 |
| 159 | 556 |

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charge of such land, and collect and hold, subject to the order of the court, rents and profits accruing thereon during the year allowed for redemption thereof, on showing inadequacy of the security and insolvency of the debtor?

Appellant Adolphus E. Merritt owned, and, with his wife and co-appellant, Zora Merritt, mortgaged to appellee seven hundred and seventy-two acres of land in Switzerland county to secure the payment of a debt of \$18,000. August 21st, 1890, appellee brought suit in the Switzerland Circuit Court against appellants and others to recover judgment on the debt and to foreclose the mortgage.

The complaint alleged the insolvency of the debtor and insufficiency of the security, and asked for the appointment of a receiver.

Such proceedings were afterward had that on the 22d day of September, 1890, said court rendered judgment in said cause against appellant Adolphus E. in favor of appellee for \$21,541, and costs, and rendered a decree foreclosing said mortgage as against both, with others joined as defendants. The court at the same time made an order continuing the matter of the application for the appointment of a receiver until the next term of said court.

October 30th, 1890, an order of sale was issued on said decree to the sheriff of Switzerland county, who, after due notice, sold said land under said decree on the 6th day of December, 1890, the appellee and mortgage creditor becoming the purchaser, and paying therefor \$17,000.

The next term of the Switzerland Circuit Court after the rendition of said decree convened November 23d, 1890, and on the 3d day of the term appellee filed in said court her written motion renewing her application for the appointment of a receiver, and alleging the total insolvency of the debtors; that there was due to plaintiff on said judgment the sum of \$21,541.25, and costs, with accruing interest and costs; that said mortgaged real estate was not worth to exceed \$16,000,

and that by reason of the manner in which it was occupied and cultivated it was being damaged.

Appellants appeared and resisted the motion, and the court thereupon ordered the parties to file affidavits for and against said application. The matter came up for hearing December 9th, 1890, three days after the land had been sold by the sheriff, and a large number of affidavits were presented by each party. From the affidavits filed it is shown that the land consists of several tracts, and that of the seven hundred and seventy-two acres about four hundred acres are cleared and cultivated, and the residue is pasture land; that it is occupied by the appellants and twelve tenants, the appellants having their residence on one of the tracts and cultivating a part of the land, and the tenants each residing on and cultivating a small tract, principally in tobacco, for a share of the crop. The estimates of the value of the land vary from \$16,000 to \$30,000, and the annual rental value is shown to be \$1,800 to \$2,000.

The court appointed a receiver to "take charge of, protect and preserve during the time allowed for redemption the real estate described in said mortgage," and ordered that he "take charge of said real estate and rent the same in such manner as shall be most productive; that the same shall be rented in such parcels as shall be most advantageous. And to fully carry out this order said defendants are ordered to deliver up to said receiver the possession of all of said real estate except the residence and appurtenant out-buildings occupied by said defendants, and so much of the adjacent real estate on said Bodkin farm as said defendants desire to cultivate themselves by their own labor, not exceeding forty acres, and of which he is now in possession as a resident."

The rents collected were to be held subject to the further order of the court.

The solution of the question thus presented depends upon the construction to be given to the statute authorizing the

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redemption of lands sold on execution or decretal order, and that authorizing the appointment of receivers.

The question has never been decided under our present statutes, and in order to reach a correct solution it will be well to consider :

1st. The rule for the appointment of receivers in analogous cases prior to the enactment of statutes relating to the redemption of lands from judicial sales ; and,

2d. The rule as declared by this court under the several statutes in force prior to the enactment of the present statute.

The first statute of this State providing for the redemption of lands from judicial sales was enacted in the year 1861.

Prior to the enactment of this statute the purchaser of land at judicial sale was entitled to a deed for the land and to possession at once. There was, therefore, no occasion to ask for the appointment of a receiver after sale. The purchaser could take immediate steps to enforce his right of possession under his title. Before that time, however, courts of equity, in suits for the foreclosure of mortgages, had and exercised jurisdiction in the appointment of receivers to collect the rents and profits accruing before a sale could be had.

The fourth clause of section 1222, R. S. 1881, relating to the appointment of receivers, is merely the legislative enactment of the pre-existing equity rule. *Main v. Ginthert*, 92 Ind. 180, citing *High Receivers*, 639-666 ; *Edwards Receivers*, 356 ; *Jones Mortgages*, sections 1516, 1532 and 1533. See, also, *Connelly v. Dickson*, 76 Ind. 440 ; *Bank of Ogdensburg v. Arnold*, 5 Paige, 38 (3 N. Y. Chancery Reports, 617, note) ; *Lea Ins. Co. v. Stebbins*, 8 Paige, 565 (4 N. Y. Chancery Reports, 543, note) ; and *Jones Mortgages*, section 1521, and cases there cited.

In *Main v. Ginthert*, *supra*, this court said : " The juris-

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diction of courts of equity in the matters of the appointment of receivers over mortgaged property for the protection of mortgagees, or in aid of suits for the foreclosures of mortgages, is well established, and has long been exercised by such courts both in England and in this country."

Preliminary to considering the rule under the statute, we will review the legislation affecting the question.

The statute relative to the redemption of lands above referred to contained the following provision :

"The judgment debtor shall be entitled to the possession of the premises for one year after the sale, and in case they are not redeemed at the end of the year as provided in this act, he shall be liable to the purchaser for their reasonable rents and profits." 2 R. S. 1876, p. 220.

At that time the statute authorizing the appointment of receivers, in so far as it had any bearing on this question, was as follows :

"A receiver may be appointed by the court, or the judge thereof in vacation, in the following cases :

* * * * *

"*Third.* In all actions when it is shown that the property, fund or rent and profits in controversy is in danger of being lost, removed or materially injured.

"*Fourth.* In actions by a mortgagee for the foreclosure of a mortgage, and the sale of the mortgaged property, when it appears that such property is in danger of being lost, removed or materially injured ; or, when such property is insufficient to discharge the mortgage debt, to secure the application of the rents and profits accruing before a sale can be had.

* * * * *

"*Sixth.* And in such other cases as may be provided by law ; or when, in the discretion of the court, it may be necessary to secure ample justice to the parties." 2 R. S. 1876, p. 114.

March 31st, 1879, the redemption law was changed, and

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in lieu of the provision heretofore quoted the Legislature enacted the following :

"That whenever real estate or any interest therein shall be sold on execution, * * * the owner of the property shall be entitled to the possession thereof during the time the same is subject to redemption, but if the same is not redeemed he shall be liable to the purchaser, his heirs or assigns, for the reasonable rents, profits, or use thereof: *Provided*, If such owner is not the actual occupant of the premises sold, but the same be occupied by a tenant or other person, such tenant or other person shall be liable to the purchaser for the reasonable rent or use, and occupation of the premises, and may be treated, in all respects, as the tenant of the purchaser, who shall, in case the property is redeemed, allow, as a payment upon his judgment, the amount of the rent by him collected." Acts 1879, p. 176. This statute, in so far as relates to any question involved in this case, was not substantially different from that of 1861.

April 11th, 1881, the present statute on this subject became a law, being enacted on that date with an emergency clause, and in lieu of the provisions quoted from the statutes of 1861 and 1879, we have the following :

"The owner of the real estate or interest therein, sold as aforesaid, shall be entitled to the possession of the same for one year from the date of such sale." Section 767, R. S. 1881.

The statute relating to the appointment of receivers remained unchanged from 1861 to the 7th day of April, 1881, when the present statute on that subject was enacted, and, having no emergency clause, became a law September 19th, 1881. But one change was made in this statute. Instead of clause six, above quoted, the Legislature added the following additional ground for the appointment of a receiver :

"*Sixth.* To protect or preserve, during the time allowed for redemption, any real estate or interest therein sold on execution or order of sale, and to secure to the person en-

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titled thereto the rents and profits thereof." Clause six was re-enacted as clause seven.

Under the act of 1861, it was held that where it was shown that the property was in the hands of a tenant, who was under contract to pay a stipulated rent, which had not been paid to the judgment debtor, or the owner of the land, and that the latter was insolvent and could not redeem, the court might appoint a receiver to collect such rents, and to hold the same until the end of the year, if a redemption be not sooner made, to be paid to the debtor if he redeems, and otherwise to the purchaser. *Connelly v. Dickson*, *supra*. See, also, *Davis v. Newcomb*, 72 Ind. 413; *Ridgeway v. First Nat'l Bank*, 78 Ind. 119; and *Travellers Ins. Co. v. Brouse*, 83 Ind. 62.

It is, perhaps, but proper to say that the latter case seems to proceed on the theory that the right to the receiver depended on that provision of the statute making the judgment debtor and owner of the land liable for rents accruing during the year allowed for redemption; it being held that, although the foreclosure was after the statute of 1881 was in force, the provisions of that statute, in regard to redemption, did not affect a contract made prior to its enactment, and while the statute of 1861 was in force.

While we decide nothing relative to the latter proposition, for the reason that the question is not involved in this case, we will remark, in passing, that, in view of the decisions of the Supreme Court of the United States, as well as two recent decisions by this court, the correctness of this ruling is probably open to question. *Connecticut Mutual Life Ins. Co. v. Cushman*, 108 U. S. 51. See, also, *Davis v. Rupe*, 114 Ind. 588, and *Robertson v. Vancleave*, *post*, p. 217.

The case of *Sheeks v. Klotz*, 84 Ind. 471, was decided under the act of 1879, and, while recognizing the authority of *Connelly v. Dickson*, *supra*, and the other cases cited, and

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hence approving the principle governing in their decision, distinguishes between those cases and the case then before the court, and apparently holds that the possession, use, and occupancy of the premises by the owner during the year for redemption can not be interfered with by a receiver or otherwise. This is in apparent disregard of the principles recognized in *Connelly v. Dickson*, *supra*. Of the two cases of *Travellers Ins. Co. v. Brouse*, *supra*, and *Sheeks v. Klotz*, *supra*, it may be said that in the first the record is silent as to the adequacy or inadequacy of the security, and the only ground for the appointment of the receiver may have been to secure to the purchaser the rents and profits which, under the statute, were due to him if the premises were not redeemed; while in *Sheeks v. Klotz*, *supra*, while the original complaint for foreclosure alleged as a ground for the appointment of a receiver, inadequacy of the security and insolvency of the debtor, it does not appear what the property had sold for. The question was raised after sale, by motion to modify the order appointing the receiver, and for anything shown by the record, notwithstanding the averments in the original complaint for foreclosure, the land may have sold for enough to satisfy the debt; in which case there would be no appeal to an equitable principle, which we think is of controlling force here.

While the language used by the court is general in its terms, it may well have been used, and doubtless was used, with special reference to the facts then engaging the attention of the court. There is not, therefore, necessarily any conflict.

In the case now under consideration, if the appointment of the receiver can be sustained, it must be on ground other than a statutory liability to account for rents and profits during the redemption year, as the contract, the decree and the sale are all governed by the redemption law and law for the appointment of receiver of 1881, and as above shown these statutes created no such liability.

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In the case of *Gale v. Parks*, 58 Ind. 117, it was held that, in the absence of a statute creating such liability, the judgment debtor was liable at common law to account to the purchaser at sheriff's sale for the rents and profits of land occupied by him during the year allowed for redemption, and in *Davis v. Newcomb*, *supra*, this opinion is followed; but it will be seen from an examination of *Bryson v. McCreary*, 102 Ind. 1, and the cases there cited, that the doctrine of *Gale v. Parks*, *supra*, and of *Davis v. Newcomb*, *supra*, is questioned if not overturned.

We will assume in the decision of this case that no such liability, either statutory or otherwise, now exists in favor of a purchaser at a sheriff's sale.

Appellants suggest that the question we are required to decide is, "Who is entitled to the rents and profits of real estate sold on execution or decretal order, for one year after the day of sale; the owner, the purchaser at the sheriff's sale, or the plaintiff in the judgment?" adding that, in this case, the question arises "simply between the owner, or owners, and the purchaser at the sheriff's sale."

In this they are mistaken. No such abstract question is before us. The question here is whether or not on the precise state of facts here presented a receiver should be appointed to preserve the land from waste and to collect the rents and profits and hold them subject to the order of the court until the question of redemption or non-redemption of the land is finally settled. And the further question, viz.: In a case where the mortgaged property, sold on a decretal order, fails to sell for enough to satisfy the debt secured, and the court finds that it is insufficient in value to satisfy that debt, who, as between the debtor and the mortgage and judgment creditor, who is also the purchaser at the sheriff's sale, is entitled to such rents and profits when the land is in the nominal possession of their debtor, but in the actual occupancy of tenants, who are to farm the land for a share of the crop raised?

Appellants' position, as stated by them, is, in substance, that the redemption law leaves the judgment debtor in possession of the premises for one year, without regard to the value of the premises, or whether he occupies personally or by tenant; that his title remains unchanged during that time; that the possession thus left to him means a possession as owner, "a beneficial possession;" and that such a possession can not be conceived of except as entitling the possessor to the rents and profits—the beneficial use of the land. They say that "if the debtor could, on any contingency, be deprived of the use and rents of the property, his statutory possession would be a mere shadowy right. So construed the law would be an empty letter without spirit." They base their contention on the assumption that the right to a receiver in such cases depends upon the liability of the judgment debtor, retaining possession of the property sold by the sheriff to account to the purchaser at the sheriff's sale for rents and profits if he fails to redeem, and upon the ground that the statute giving the right to possession during the year being silent as to the rents and profits, the act of the Legislature in omitting the provision of the laws of 1861 and 1879 creating such liability on the part of occupying debtors is significant as indicating the legislative intent that the possession and the right to the rents and profits should not be in any manner interfered with during that year by the appointment of a receiver.

Of clause 7, or subdivision 7, of section 1222, relative to the appointment of receivers, they say that it was enacted before the enactment of the redemption law, and that in enacting that subdivision the Legislature must have had in view possible cases arising under the acts of 1861 and 1879, and could not have anticipated that it would afterward enact the redemption law. Assuming that this clause is in conflict with the redemption law, they say that the latter, being the latest enacted, must be taken as the latest expression of the legislative will, and must stand, while the

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other must yield. This is undoubtedly the rule when there is irreconcilable conflict between two statutes; that latest enacted will, by implication, if not in express terms, repeal the statute first enacted *Southwark Bank v. Commonwealth*, 26 Pa. St. 446; *Thomas v. Collins*, 58 Mich. 64; *Strauss v. Heiss*, 48 Md. 292.

But repeals by implication are not favored, and if by fair construction the different statutes can be made to stand together the court should give to them that construction. Sutherland Stat. Con., section 138, and authorities there cited; *Coghill v. State*, 37 Ind. 111, and many other authorities that might be cited, all to the same effect. This is especially true of statutes enacted at the same session but on different days. They will be construed as *in pari materia*, it being presumed that harmony, and not contrariety, was the aim of the legislative body in its various enactments. Sutherland Stat. Con., section 288.

This rule has added force as applied to the legislative body which enacted both the statutes in question. We must, of course, take notice of the fact that the Legislature of 1881, aided by the labors of a commission created for that purpose, codified the statutes of the State, and that the two statutes in question were enacted as parts of the code thus framed. We think, however, that properly construed and applied there is no conflict between the two statutes.

We think the idea of conflict between the two statutes, as applied to cases of the character now before the court, grows out of a misunderstanding of the relations existing between the mortgagee and judgment creditor and purchaser on the one hand, and the occupying mortgagor and debtor on the other, and of their respective rights in the land sold, as well as a misunderstanding of the principle governing the appointment of receivers in such cases.

Appellants seem to assume that the appellee is to be treated simply as a purchaser at a sheriff's sale, without distinguishing between an execution sale and a sale on a de-

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cretal order based on a decree foreclosing a mortgage. They also assume that the right to a receiver in such cases is dependent on the liability of the occupying debtor to account to the purchaser at sheriff's sale for rents and profits.

There may be cases where, upon a showing of threatened waste by the occupying debtor, greatly diminishing the value of the property, a receiver should be appointed at the instance of a purchaser at execution sale, and there may also be other cases where such appointment would be made at the suit of a purchaser at execution sale.

We do not decide this question, as we do not regard it as before us. We do decide, however, that for the mere collection and preservation of rents and profits a receiver will not be appointed under the present statute at the instance of a mere purchaser at an execution sale; and if, in this case, the rights of the appellee are only those of a purchaser at a sheriff's sale, appellants are right in their contention, and no receiver should have been appointed.

Is the appellee to be regarded as a mere purchaser at a sheriff's sale, and nothing more? If so, her rights are such as the statute gives, and no more: *Davis v. Rupe, supra*. The fact that the purchaser is also the judgment creditor, is said, in the case last above cited, not to affect the question, or to have any bearing on the relative rights of the parties. Of judgment creditors purchasing at their own sales, the court says that "Thenceforward their interest in the property was as purchasers at an execution sale, not as creditors."

Without inquiring as to the correctness of the rule thus laid down, or the principle upon which it is founded, we note the distinction recognized in this case as existing between the rights growing out of execution sales and sales on decretal orders.

On page 598, the writer of the opinion says: "Redemption from sales made in pursuance of decretal orders in foreclosure cases may stand upon a somewhat different basis.

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There is a sense in which a mortgagee acquires an estate or interest in the land mortgaged."

True, the writer of that opinion was discussing a different phase of the redemption law from that here involved, but we quote the language used as being a clear recognition by this court of a plain distinction between the two classes of sales, and of the rights incident to each.

In this case the application for the receiver does not come, simply from the purchaser at the sheriff's sale, but from the purchaser, who is also the mortgage and judgment creditor; who, in becoming judgment creditor and purchaser, has not ceased to be also mortgage creditor. The judgment and decretal order in such cases are simply in aid of the mortgage creditor's rights and for their enforcement. Nor did she, in becoming purchaser under her decree, lose those rights. The land had been by the debtors pledged for the payment of this debt. The sale has but partially paid it, and the question now, as before the sale, is between the mortgage creditor and the insolvent mortgage debtor, with the mortgaged property inadequate to secure the debt. Such lien upon or interest in the land as she has exists, not by virtue of the decree, but of the mortgage.

In the case of *Union Mutual Life Ins. Co. v. White*, 106 Ill. 67 (74), it is said: "The foreclosure and sale did not change the relation of the parties, and they were still mortgagor and mortgagees."

In the case of *Stephens v. Illinois Mutual Fire Ins. Co.*, 43 Ill. 327, it is said: "If it is a sale under a decree of foreclosure, the mortgagor still has the estate of a mortgagor, with this qualification, that the amount and time of redemption have become absolutely fixed by the decree and sale, and his estate will be absolutely divested if he fails to redeem within the allotted time."

If the mortgagor still has the estate of a mortgagor until the expiration of the year for redemption, it follows that

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the mortgagee, during that time, still has the estate of a mortgagee.

In *Wilsie Mortgage Foreclosures*, it is said: "The title and possession remain in the mortgagor until such conveyance upon sale. The interest of the mortgagee remains until then that of a mere lienor. The commencement of a foreclosure gives him no title, as his mortgage is only a security for a debt; the title and seizure remain in the mortgagor until the referee's deed upon sale is actually delivered to the purchaser." Section 11, page 10.

The lien in such cases is specific, and is created by the act of the parties. It dates from the execution of the mortgage, and not from the rendition of the decree. The decree neither creates nor declares it, but simply provides for its enforcement. The redemption statute postpones the time for the ending of the equity of redemption, and thus gives a year's additional existence to the mortgage lien. The distinction between the lien thus created and enforced and a judgment lien is at once obvious. The judgment lien is created by statute. It is not specific, but a general lien upon all property within its reach of the class designated by statute as being subject to such lien. The lien only becomes specific as to any particular property by virtue of a levy of an execution thereon. Whether the lien remains the general lien of the judgment, or becomes specific by levy, such lien still remains a creature of the statute, and the judgment creditor acquires thereby only such rights as are given him by the statute.

If it is true, then, that the appellee, in asking for the appointment of the receiver in this case after the sale under the decree, still stands before the court in the character of a mortgagee, we find ourselves on familiar ground, and the problem is easy of solution.

As has heretofore been shown, long before the enactment of redemption statutes courts of equity appointed receivers at the instance of mortgagees when the security was inade-

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quate and the debtor insolvent, but such receivers were only appointed until a sale could be had, for the reason that the purchaser, being entitled to a deed and to possession at once, needed no receiver after sale. The enactment of the redemption law, postponing the creditor's right to a deed and to possession for a year, and the further enactment of the seventh clause or subdivision of section 1222, gives legislative sanction to the extension over that additional period of the power to appoint receivers in proper cases. Indeed, we are inclined to the opinion that the enactment of this clause, like the enactment of the fourth clause, was merely a legislative declaration of a power which courts of equity possessed and could have exercised independently of the statute.

But it is said this will render nugatory the statute giving the debtor possession and the right to redeem during an additional year.

As counsel for appellants say, "the statutory possession during that year would be a mere shadowy right, and the statute so construed would be an empty letter without spirit."

This court, in the case of *Connelly v. Dickson*, *supra*, speaking by Justice WOODS, has foreclosed discussion on this question. It is there said, after referring to the settled equity power of the court to appoint a receiver before sale: "Now, the mortgagor's right under the law to the possession of his land before the sale is not less absolute or sacred than the right given him by the later law, to continue in possession for a year after the sale, and it is not presumable that the law, by which the latter right was declared, was intended to confer a higher right of possession after the sale than the party, as owner of the title, had before the sale. * * * There is no ground for assuming that there is an implied repeal, as there is certainly no express repeal of the equity powers of the courts to interfere between the parties, for the same reasons and purposes as would justify its interposition between other parties whose relations and rights are defined by law or by contract. The fact that the rights

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and obligations of the parties in such cases are declared by statute does not make them any stronger or more sacred than if the statute did not exist, and the same rights and obligations arose from a contract in each case between the parties." Page 450.

The proposition seems too plain to admit of argument that the redemption statute gives to the debtor no new or additional title or right, but simply extends for one year his existing rights, and we confess our inability to understand what incident attaches to the debtor's possession by reason of the sale, that places it beyond the reach of a court of equity.

We have found but one case outside of this State which seems to us to be in point, and entitled to weight as authority upon this particular point. This is the case of *Schreiber v. Carey*, 48 Wis. 208. The statute of Wisconsin, instead of allowing a year after sale for redemption, before a deed could be made, allowed a year after decree foreclosing the mortgage before sale. The same result was reached as under our statute, but by a different process. Previous to the enactment of this statute a statute was in force there similar to our statute, in that it gave a year after sale for redemption. The court says: "It is insisted by the counsel for appellant * * * that chapter 195, Laws of 1859, which secures to the mortgagor a right to redeem the lands for one year after the foreclosure sale, prevents the issuing of a deed until after the expiration of such year, and provides that the mortgagor shall remain in possession until the expiration of such year, is a clear legislative declaration that the mortgagee shall not have any benefit of the mortgaged premises under any circumstances until after the time for redemption has expired; and that the law which now prohibits any sale until one year after the judgment of foreclosure is entered, is equally conclusive of the intention to prohibit any right of possession on the part of the mortgagee until after the expiration of such year."

This sounds to us singularly like the contention in the case now under consideration. Reference was made to the case of *Finch v. Houghton*, 19 Wis. 150, in which case a receiver had been appointed *pendente lite*, and the court says: "It can not be said that the right of the mortgagor now to remain in possession after judgment for one year, until after the sale is made, is any more sacred than it was then to remain in possession until after judgment, and until sale made under the old law; and yet this court held, in the case above cited, that, when equity and good conscience demanded, in order to protect the interest of the mortgagee, he might be removed from the possession before judgment and sale. If, under the law as it now is, the right of possession is inviolable in the mortgagor until after the sale made, it was equally so under the law as it stood previous to 1859. * * * That the possession is secured to the mortgagor for a longer or a shorter time, by statute, can not change the principle; and if the right to appoint a receiver may be exercised by the court before the expiration of the shorter period fixed by the statute, it may with equal propriety be exercised before the expiration of the longer period. There is nothing, therefore, in the laws extending the time before a sale can be made upon a foreclosure judgment, which detracts from the authority of *Finch v. Houghton, supra.*" This case is cited approvingly in *Sales v. Lusk*, 60 Wis. 490.

With regard to the claim that to allow the appointment of a receiver in such cases is to deprive the statute of vital force, it seems to us that a statute which extends the right of redemption for a year, and at the same time insures to the debtor and his family a home during that time, can hardly be called an empty letter without spirit. And if the rights thus conferred are "shadowy" they are very substantial shadows.

We think it can not be justly said that by this application of clause seven of section 1222, authorizing the appointment of receivers, any right of a debtor conferred by the redemp-

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tion law is destroyed or impaired. That statute simply extends the right of redemption one year, and continues during that year his right of possession.

Of this statute it may be well said, as was said by this court in *Connelly v. Dickson*, *supra*, of the statute of 1861: "There is no ground for assuming that there is an implied repeal, as there is certainly no express repeal of the equity powers of the courts to interfere between the parties, for the same reasons and purposes as would justify its interposition between other parties whose relations are defined by law or by contract." See page 450.

While we recognize the highly remedial character of the redemption statute, and are deeply impressed with its humanity, and with the justice of the rule by which such statutes are liberally construed, we are also deeply impressed with the fact that the courts, while liberal in applying to such statutes rules of construction, are none the less required to construe them in accordance with established rules of law.

When courts of equity possess the unquestioned power in certain cases to appoint receivers to collect rents and profits of land *before sale*, as against one whose title and right of possession are both unquestioned and unquestionable, we are not aware of any rule of statutory construction which would justify us in holding that a statute which simply extended that right of possession one year after sale, and nothing more, destroyed the jurisdiction of courts of equity to interfere with that possession in similar cases after sale.

As we have heretofore said, statutes enacted at the same session as these statutes were are to be construed *in pari materia*. It will be presumed that a Legislature, engaged in a codification of the statutes of the State, intends such code to be a harmonious and congruous whole, and the fact that one particular provision of it meets with legislative sanction four days later than another, will not justify the court in construing them as separate and wholly independent legislative acts.

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especially in provisions relating to the same subject-matter, but they must be construed together.

Statutes will not only be thus construed together, but they will be construed in the light of settled rules of common law and of equity.

The whole body of statutory law, common law and equity are in our system of jurisprudence construed, as are construed the several provisions of a code, as together constituting a harmonious whole.

Every statutory enactment is construed by the light of the common law and with reference to its cognate principles, and this is true not only of the common law proper, but of established principles of equity jurisprudence; and it will never be presumed that in the enactment of a given statute the Legislature intended to make any innovation upon the common law further than the necessity of the case required. These principles are elementary, and so fortified by authority that it is hardly necessary to cite any, but we will refer to Sutherland Statutory Construction, section 289, *et seq.*, and cases there cited.

An examination of the two statutes will show that they should be construed together, not alone for the reasons heretofore given, but because they refer to and treat of the same subject-matter.

Clause seven of section 1222, *supra*, has sole reference to the appointment of receivers during the "time allowed for redemption" of lands sold.

The one statute gives time for the redemption of lands sold, and extends the debtor's possession to cover that time, while the other statute provides for the appointment of receivers for lands thus sold, covering the same period, and can have no conceivable force or application whatever except as to lands subject to redemption and held under section 767, *supra*.

In our opinion, on the facts shown in this case, the appellee was entitled to the appointment of a receiver. We have

said nothing with reference to the charge of the commission of waste, and what, if any, weight should be given to it, as there is abundant reason for sustaining the action of the trial court without considering that question.

That there may be no misunderstanding of what we decide in this case, we will say that we do not decide that any purchaser at sheriff's sale is, as such purchaser, entitled to the appointment of a receiver. Nor do we decide that, in any case, a judgment debtor is to be disturbed in the actual personal occupancy of land sold at any judicial sale, whether on execution or on decretal order during the year allowed for redemption, as the facts in this case do not require that we decide that question.

We do decide, however, that where lands are sold at a mortgage foreclosure sale, and the mortgage creditor is the purchaser, if he shows that the mortgaged lands are inadequate to secure the debt, that the debtor is insolvent, and that the lands, or a material part of them, are in the actual occupancy of tenants who are to pay rent therefor by a share of such crops as they raise thereon, or otherwise, a court of equity may appoint a receiver to collect the rents and profits accruing from that portion of such lands as are thus occupied by tenants, and hold them to the expiration of the year allowed for redemption, subject to the order of the court, to be paid to the debtor if he redeems, or to the mortgage creditor, if the debtor does not redeem.

The conclusion we thus reach gives full force and effect to all parts of the redemption law, and all parts of the law for the appointment of receivers, disclosing no conflict whatever between the two statutes. We are also, we think, aside from the statute, justified in this conclusion by well-settled and often-adjudicated principles of equity. In this case the trial court instructed the receiver not to disturb the debtors in their occupancy of the residence, and appurtenant out-buildings, and such of the adjacent lands, not exceeding forty acres, as appellants desired to cultivate themselves by their

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own labor, and of which they were then in possession as residents. We do not wish to be understood as indicating that the amount of land thus set off to appellants should be taken as a measure of the rights of debtors in such cases. In this case there was controversy as to the quantity of land actually occupied by appellants, and the order made may be assumed to be an adjudication of their actual personal holding. While we wish it expressly understood that we do not decide that the courts may designate any definite quantity of land as proper in all such cases to be set off to debtors, we think that on the facts shown in this case the court seems to have dealt fairly with appellants.

In conclusion we will add, that to give to the redemption law the force and interpretation contended for by appellants will make it, not simply a redemption law, but an exemption law. We do not think the Legislature ever intended it to have this effect. The Constitution of the State provides for the enactment of "wholesome" exemption laws. Acting upon this humane provision of the Constitution, the Legislature has provided that the debtor may have, in proper cases, property to the value of \$600 exempt from levy and sale on execution. The amount to be allowed to the debtor as exempt from execution is left solely to the discretion of the Legislature. The courts can neither add to nor take from the amount thus fixed.

We can not think the redemption law was intended to operate as giving an additional exemption. We have nothing in this State corresponding to the homestead law of Iowa and of some other States, and we do not think cases arising under such laws can materially aid in throwing light on this subject. Homestead rights, as secured by these statutes, being in the nature of absolute exemption, there would be good reason for holding that a receiver could not be appointed to interfere with their enjoyment. And this, while not decided by the Supreme Court of Iowa, has been several times suggested by it. *Callanan v. Shaw*, 19 Iowa, 183;

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Myton v. Davenport, 51 Iowa, 583, and *Paine v. McElroy*, 73 Iowa, 81.

There is nothing, however, in these cases in conflict with the conclusion we have reached in this case. If we were to give to the redemption law the effect contended for by appellant, it would be equivalent to giving to appellant an additional exemption of \$1,800 to \$2,000.

We think the circuit court did not err, and its judgment is affirmed, with costs.

Filed March 17, 1891; petition for a rehearing overruled Sept. 24, 1891.

DISSENTING OPINION.

ELLIOTT, J.—I can not assent to the conclusion that where mortgaged property is not of value sufficient to satisfy the judgment embodied in a decree of foreclosure the mortgagee may, upon showing that fact, have a receiver appointed to collect the rent during the year allowed for redemption, for I think that the mere fact that the mortgaged property is not of value sufficient to satisfy the judgment does not authorize the appointment of a receiver. I do not doubt that there may be cases where a receiver can be appointed, but I do believe that to justify the exercise of the extraordinary power of seizing property by the appointment of a receiver, something more than the bare inadequacy of the mortgagee's security must be shown. I believe that the conclusion that the owner may be turned out of possession and a receiver put in solely and simply because the mortgaged property is not of sufficient value to pay the judgment, involves the destruction of our humane and beneficial redemption law.

Our system of redemption from judicial sales is the creature of statute, and to ascertain the rights of those who buy at such sales, as well as the rights of those whose property is sold, the courts must take the law as it is written. Omissions can not be supplied by adding provisions, nor can the courts take from the statute any material provision.

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The law as it came from the Legislature is to be interpreted and enforced by the judiciary, but it can not be changed. It is, to be sure, entirely proper to construe the statute in the light of the principles of jurisprudence, but the positive written law can not be borne down by any general rule of the unwritten law. As the redemption system is statutory and is radically different from any known to the unwritten law, either as administered by courts of chancery or by the common law tribunals, no great light is thrown upon the subject of redemption from judicial sales by the decisions of such courts upon general principles of equity or law.

Our statute books show that changes have been made from time to time in the system of redemption from judicial sales. Each and every change has been in the direction of liberalizing the debtor's right to redeem.

Assuming, as it seems just to do, that our system is statutory, that the changes made indicate the legislative purpose to augment, and not diminish, the right of the debtor, the conclusion must be that a provision giving the debtor possession for the redemption year means possession in all the term implies. It means that the debtor shall enjoy all the incidents of an owner, and enjoy them unmolested and undisturbed by a receiver, or by any one else. It is impossible to restrict the meaning of the word "possession" to a mere *pedis possessio*, without doing violence to plain and settled rules. In language as plain and explicit as ever was employed it is declared that the debtor shall have possession for one year after the sale: These are the words of the statute: "The owner of the real estate, or interest therein, sold as aforesaid, shall be entitled to the possession of the same for one year from the date of sale." There is nothing for the courts to do save give effect to the words of the law, for there is neither ambiguity nor obscurity.

The import of the words is unmistakable and the purpose of the Legislature evident. What was meant, and what is

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said, is, that the owner shall have possession for one year, and, if this be true, it is absolutely impossible that possession can be wrested from him by a receiver. Either the owner is entitled to possession as owner, or he is not entitled to possession at all. If he is entitled to possession as owner, all the incidents of that possession attach. That he is entitled to possession as owner is clear, for in no other possible capacity can he retain possession; hence he has all the incidents of an owner in possession of land. If he does possess all such incidents, then it is clear that neither by the appointment of a receiver nor in any other mode can he be stripped of them. Owning all the incidents, he can not be made to account for rents and profits, inasmuch as no owner can be compelled to do this where the law does not exact it. Under former statutes the owner was bound to account for rents and profits; under the present he is not. As he is not bound to account, there is no reason for appointing a receiver to take what the owner is entitled to receive. Whether, at the end of the redemption year, accumulated rents may be subjected to the payment of the unsatisfied part of a judgment or decree is not the question in this case; the question here is, can the owner be put out of possession and a receiver put in? Until the redemption year expires no rent is, or can be, due from the owner, and there is nothing for a receiver to collect.

It comes at last to this, shall the statute which explicitly gives the owner possession be narrowed to mean that he shall have possession only where a court does not see fit to appoint a receiver at the suit of a mortgagee who alleges that the real estate is not of sufficient value to satisfy the decree?

The right of a mortgagor is a substantive right and a contract right. This is the law as long since declared by the Supreme Court of the United States. *Brine v. Insurance Co.*, 96 U. S. 627; *Bronson v. Kinzie*, 1 How. 311. Affirming this rule and yielding to its force, it was decided in the case of *Mutual L. Ins. Co. v. Union Mills, etc., Co.*, 3 Lawyers'

Rep. Ann. 90, that a receiver could not be appointed where the statute gives the mortgagor the right to possession. In *Teal v. Walker*, 111 U. S. 242, it was held that where there is a right of possession in the mortgagor it absolutely establishes the rule that he is entitled to rents and profits. This general doctrine was, to some extent at least, sanctioned in *Favorite v. Deardorff*, 84 Ind. 555. It is entirely safe, therefore, to affirm that the Legislature meant to create a substantive property right. That its intention was clearly and appropriately expressed there can be no doubt. As a substantive right was vested in the owner by express statute, it can neither be divested nor impaired.

Assuming, upon the strength of the arguments and authorities adduced, that a substantive right was vested in the owner, it must follow that the Legislature had a definite object in view in vesting the right. If that object can be ascertained, the courts must exert their power to accomplish it. A right created as that of the owner is created, can not be made a barren one by judicial decisions, since that would defeat the object the Legislature intended to accomplish. The right created by the statute is not a mere nominal one; it is, on the contrary, a substantial and fruitful right. It was created to prevent the debtor from being put out of possession during the year for redemption, and to enable him to enjoy all the fruits arising from the right of an owner in possession. Two leading purposes, at least, were intended to be given effect: First. That the creditor should be compelled to bid the full value of the mortgaged property and not fall upon other property of the debtor to satisfy the unpaid part of the judgment. *Horn v. Indianapolis Nat'l Bank*, 125 Ind. 381; *Hervey v. Krost*, 116 Ind. 268. Second. To assist the debtor in raising means to effect a redemption. *Bryson v. McCreary*, 102 Ind. 1. But whatever may be the incidental purpose of the act this much is certain, the Legislature has in strong and clear words declared that the owner shall have possession for one year after the sale, and

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this declaration was made in a statute directed to, and concentrated upon, the special subject of redemption from judicial sales.

The provision in our statute placing the right of possession in the owner was enacted after many experiments had been tried and many decisions rendered, so that it is to be regarded as the result of careful deliberation, and as the final legislative conclusion. The change made by the act of 1881 takes the ground away from some of the decisions and indicates, as has been shown, a purpose to liberalize and broaden the rights of the owners. Even prior to the change wrought by that act there was conflict upon the question of a right to a receiver, and, certainly, the present statute has augmented the owner's right. Redemption statutes are to be liberally construed in favor of the debtor. *Davis v. Rupe*, 114 Ind. 588. The statute of 1881 can not be given a liberal construction and it still be held that the possession of the owner may be made to yield to that of a receiver. To appoint a receiver would be, as said in *Sheeks v. Klotz*, 84 Ind. 471, "in violation of the spirit and letter of the statute providing for redemption." Other courts have asserted or indicated a doctrine which is here of great force, inasmuch as they have said that to appoint a receiver is to give the creditor property the law does not entitle him to obtain. *Hoge v. Hollister*, 8 Bax. (Tenn.) 533; *Callanan v. Shaw*, 19 Iowa, 183; *Myton v. Davenport*, 51 Iowa, 583; *Goodhue v. Daniels*, 54 Iowa, 19; *Paine v. McElroy*, 73 Iowa, 81. If the creditor is allowed to seize the rents through the medium of a receiver, he obtains what the law intends the owner shall receive and enjoy. If the rental value of land should be but fifty dollars per annum, it seems quite clear that it could not be taken from the owner, and the principle must be the same although the rental value may chance to be a great deal more. If the land should comprise one acre only, that one acre could not be wrested from the owner's possession, and the principle must be the

same whether there are many acres or no more than one. If the question stood on the redemption statute alone it would be entirely free from difficulty and clear of doubt. The doctrine maintained by me does not give the redemption statute the effect of an exemption law, for it concedes that if the rents at the expiration of a year exceed the amount of the exemption they may be reached by legal process, but it does affirm that the rent can not be collected by a receiver during the year. At the end of the year, in cases where there is no redemption, the accumulated rents may be reached by a creditor, not because they are rents, but because the amount over and above the sum allowed the debtor by the exemption law is property subject to execution. In my view there is and can be nothing due or owing from the owner until after the year for redemption has expired, but if at the end of the year there is money or property, although derived from the mortgaged land, subject to execution, the creditor may reach it in the appropriate proceeding.

The only possible doubt that can arise grows out of a provision found in a statute which enumerates the cases in which a receiver may be appointed, but this doubt vanishes upon analysis and investigation.

The general statute regarding receivers can not displace or overthrow the plain and unequivocal provisions of the redemption statute. For this conclusion three reasons may be assigned :

First. The statute respecting receivers is a general one, affecting matters of procedure, while the redemption statute is a special one, creating an essential property right, and the law is that the provisions of a special statute will prevail over those of a general statute. .

Second. The provisions of the statute respecting receivers may be harmonized with the redemption law without doing violence to its language.

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Third. If the two statutes can not be harmonized, the redemption law is the later, and must prevail.

The first of these reasons needs no elaboration. The second and third will be briefly considered.

The statute respecting receivers designates the cases in which a receiver may be appointed, and one of the enumerated cases is designated in these words: "To protect or preserve, during the time allowed for redemption, any real estate or interest therein sold on execution or order of sale, and to secure to the person entitled thereto the rents and profits thereof." Section 1222, R. S. 1881.

It is quite clear that the first clause of this sentence only embraces cases where some tortious act is threatened or done which may cause injury to the property, or which may put it in danger. By no possible construction can that clause be so extended as to embrace a case where the owner simply retains possession, and is guilty of no wrong, for its language is too plain to admit of doubt. It is obvious, therefore, that if the redemption statute must go down at all it must go down because of the last clause of the provision, which reads, "and to secure to the person entitled thereto the rents and profits thereof." But that clause does not create a new class of cases, or refer to a class of cases different from those designated in the first clause of the sentence. The meaning is, that where there is a tortious act likely to injure or endanger the property, a receiver may be appointed to take possession, collect the rents and ultimately pay them to the party "entitled thereto." Even if it be true that a broader meaning can be given to the single clause, still, it does not follow that a receiver may be appointed and possession be taken from an owner who does no tortious act, but simply remains in possession of the land. This must be true, because it is settled that the owner is entitled to all rents and profits during the redemption year (*Sheeks v. Klotz, supra*; *Ridgeway v. First Nat'l Bank*, 78 Ind. 119; *Adams v. Glidden*, 111 Ind. 528; *Taylor v. Morgan*, 95 Ind. 456), and if

the owner is entitled to the rent the mortgagee can not be the person "entitled thereto" within the meaning of the statute. But, conceding that the mortgagee may ultimately reach the rents, he can not do so until the year has expired, and it becomes certainly known that there will be no redemption; for it is elementary law that where there is an express contract to pay rent none can be recovered until the expiration of the term unless it is otherwise stipulated in the contract. The utmost that can be conceded is that at the end of a year the mortgagee may reach the rent, but this concession will not authorize the conclusion that a receiver may be appointed at the beginning of the year in a case where the owner simply retains possession, neither threatening to do a tortious act nor doing one. The rule is well settled that until a mortgage debt is due a receiver will not be appointed unless some wrong is shown endangering the security, and certainly an owner in possession does not owe rent until the end of the redemption year. But some of the concessions suggested are very much broader than a mortgagee is entitled to have made, for it is only where there is some tortious act that an owner can be turned out of possession and a receiver put in.

It is a mistake to suppose that there are no cases except those in which trespass or waste is committed to which the provision quoted from the statute, respecting receivers, can apply. There are such cases, as for instance where the owner leases the property for a purpose that endangers its safety, or so uses it himself as to put it in peril. There are other cases where the statute will apply, as, for instance, where the owner suffers the property to be sold for assessments or taxes. Cases of waste and trespass, as well as cases of the character indicated by our illustrations, were the cases contemplated by the Legislature, for it is neither just nor consistent with the rules of construction to hold that it was the legislative intention to break down the strong, explicit, and particular provision enacted in favor of the owner. Both acts can be

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given effect upon the theory outlined in the preceding pages, and hence both can be upheld.

It is unnecessary to dwell upon the third reason stated in support of the conclusion that a receiver can not be appointed in such a case as this. The redemption act is the later act, and although the two acts were passed at the same session, it must prevail, if there is an irreconcilable conflict. If the provision of the redemption act giving the owner possession must fall, it will be for the sole reason that a single clause of a single subdivision of a single section is strong enough to warrant the conclusion that a mortgagee may secure a receiver in a case where the owner, free from fraud or positive wrong, simply remains in possession, as the statute says he may do.

If a receiver can be appointed in the case of a sale on a decree, one can be appointed in the case of a sale on execution, for the statute joins the two things together so that they can not be severed without legislation. These are its words: "Real estate sold on execution or order of sale." No distinction is made by the Legislature between sales on executions and sales on decrees of foreclosure, and the courts have no power to make any.

The doctrine of the principal opinion, carried to its logical results, will completely overthrow the redemption statute.

MILLER, J., concurs in the foregoing opinion.

Filed March 17, 1891.

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No. 11,342.

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ARBITRATION AND AWARD.—*Action for Work and Labor.*—*Counter-Claim for Fraud.*—*Submission to Arbitration.*—*Award, Bar to Subsequent Action.*—In an action for work and labor and for material furnished in the construction of a building, the defendants pleaded a counter-claim claiming damages occasioned by the alleged fraud and misrepresentation of the plaintiffs in relation to the estimates of material and the cost of construction of such building. All matters in dispute in the action, matters of defence, counter-claims, etc., were submitted to arbitration, and a finding made by the arbitrators in favor of the defendant.

Held, that the award was a bar to any subsequent suit against the plaintiffs for the alleged fraud set up in the counter-claim.

SAME.—*Joint Tort Feasors.*—*Award Against One.*—*Effect of upon Others.*—The defendants, by setting up their claim for damages on account of the fraud complained of as a counter-claim against one of the alleged tort-feasors, and submitting the whole controversy to arbitration, thereby elected to rely upon such proceeding for their compensation, to the abandonment of the other tort-feasors.

SAME.—*Pleading.*—*Reply.*—*Demurrer.*—Where, in an action against such tort-feasors, the answers show that everything connected with the former action was submitted to arbitrators, and that their award covered the whole ground of the controversy, a reply is demurrable which does not dispute the fact that all demands, including that embraced in the counter-claim, were submitted to arbitration, but alleges simply that the arbitrators did not award the plaintiffs anything on that account.

SAME.—*Separation of Arbitrators.*—*Sufficiency of Reply.*—It appeared from the allegations of the reply that the three arbitrators considered the evidence, and that two of them found for the plaintiffs, and that one of them drew up an award, which was signed by both of said arbitrators, when they separated; that after the award had been signed and the separation taken place the two who had found for the plaintiffs procured an attorney to draw up another award in favor of the same party, and for the same amount, and without consultation with the other arbitrators signed this award and promulgated it.

Held, that the allegations of the reply are not sufficient to show a completion of the work of the arbitrators and a final separation after the first award; that the separation, so far as appears from the allegations, may have been only an adjournment to another time and place, or a mere temporary separation.

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PRACTICE.—*Pleading.* — *Reply.* — *Demurrer.* — *General Denial.* — *Subsequent Withdrawal of.*—A reply which sets up only such facts as are admissible under the general denial already in is demurrable, and the subsequent withdrawal of the general denial will not render the ruling sustaining the demurrer available error.

From the Allen Superior Court.

L. M. Ninde, for appellants.

— *Coombs, R. C. Bell and S. L. Morris*, for appellees.

MILLER, J.—This was an action by the appellants against the appellees, the Bass Foundry and Machine Works, John H. Bass and Harris M. Lund, jointly, for damages occasioned by their alleged fraud and misrepresentation in relation to the estimates of material and the cost of construction of a penitentiary in the State of Illinois, by which the plaintiffs, who relied upon the estimates and representation, contracted for the construction of the building, and were damaged in a large sum of money.

The defendants answered, jointly, the general denial. They also severally filed answers substantially alike, and in substance as follows:

That before the commencement of this suit said Bass Foundry and Machine Works had commenced a suit against the said plaintiffs for work and labor done and performed, material furnished, and money laid out and expended in the construction of said building, under and pursuant to a contract with the plaintiffs, aggregating the sum of \$50,000.

That said Baltes and Nelson appeared to said action and pleaded, among other things, a counter-claim, alleging and setting up the identical same causes of action and matters alleged in the complaint in this action, and claiming damages in the sum of \$55,000; that such proceedings were had in said action as that the parties to said suit agreed to arbitrate all matters in dispute therein, and by their written submission, after reciting the pendency of said action and the pleadings therein, it was agreed between them that all said differ-

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ences, and all matters involved in said suit, and all the causes of action, matters of defence, counter-claims, payments, set-offs, and all other grounds of defence and causes of action, and claims of every kind and nature, legal and equitable, set forth in defendants' answer, counter-claim, etc., were referred and submitted to Stephen B. Bond, Frederick Beach, and Charles McCulloch, for trial, decision and determination, as arbitrators, who, or a majority of them, were to make a written report, finding, and award, upon all matters submitted to them; that the parties would severally stand to, perform and abide by their award; that said arbitrators took upon themselves the burden of said arbitration, met, heard all the evidence adduced, and having considered all the subject-matters referred and submitted to them, the said Bond and McCulloch, two of the arbitrators, did, at the proper time, make their award in writing of the matters submitted to them, by which they found that said Bass Foundry and Machine Works should pay to said Baltes and Nelson the sum of \$223.74 in full settlement of all the matters so referred and submitted to them; that duplicate copies were, on said day, delivered to said Baltes and Nelson, and to the said corporation; that immediately thereafter the amount of said award was tendered to said Baltes and Nelson, which they refused to receive, and that tender has been kept good ever since, and is now brought into court for them.

The answers contain some other allegations of a negative character that need not be referred to or set out.

Demurrers were overruled to each of these paragraphs of answer, and these rulings are assigned as error.

The appellants, in their brief, point out no objections to the sufficiency of the separate answer of the corporation, but earnestly contend that the answers of Bass and Lund are fatally defective, for the reason that they were not parties to the arbitration or the suit in which the arbitration was had.

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The appellees, on the other hand, contend that the arbitration and award pleaded by them constitute a complete bar to the appellants' right of action :

First. Because they operate to release the Bass Foundry and Machine Works, one of the alleged joint tort-feasors, and thereby release the others.

Second. Because appellants have thereby received full satisfaction of the several claims sued for in this action.

The law is well settled that the joint act of several trespassers forms but one injury, and that injury requires but one compensation, and each of the joint trespassers is liable for the whole wrong committed, and if the injured party receives satisfaction from one, it absolves all the others ; also an accord and satisfaction with one, or a release to one, discharges all the others. *Allen v. Wheatley*, 3 Blackf. 332 ; *Johnson v. Vutrick*, 14 Ind. 216 ; *Fleming v. McDonald*, 50 Ind. 278 ; *Everroad v. Gabbert*, 83 Ind. 489.

The liability of tort-feasors is several, and an action may be had against all or any, or each may be sued separately, and the actions prosecuted to final judgment, but then the plaintiff must elect against whom he will take execution. A final judgment and an execution, or an order for an execution, against one of several joint trespassers is a discharge of all the others. *Allen v. Wheatley*; *supra* ; *Fleming v. McDonald*, *supra* ; *American Express Co. v. Patterson*, 73 Ind. 430.

In *Cooley Torts*, pp. 137, 139, it is said : " The second, or even a subsequent, suit may proceed until a stage has been reached in some one of them at which the plaintiff is deemed in law to have received satisfaction, or to have elected to rely upon one proceeding for his remedy to the abandonment of the others. * * It is to be observed in respect to the point above considered, where the bar accrues in favor of some of the wrong-doers by reason of what has been received from or done in respect to one or more others, that the bar arises not from any particular form that the proceeding assumes, but from the fact that the injured party has

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actually received satisfaction, or what in law is deemed the equivalent." See, also, *First Nat'l Bank v. Indianapolis, etc., Co.*, 45 Ind. 5.

Slight acts are sufficient to indicate an election on the part of an injured party who has obtained several judgments against the tort-feasors to look to one of them for satisfaction, such as obtaining execution, or even entering an order for an execution on one of the judgments. In England the simple act of bringing suit separately against one of the parties is held to be a conclusive election to look to him for satisfaction.

As between the appellants and the Bass Foundry and Machine Works, the submission of the cause of action set up in the counter-claim to arbitration and the award thereon is a complete bar to any subsequent suit, and this without any performance or satisfaction of the award. *Terre Haute, etc., R. R. Co. v. Harris*, 126 Ind. 7; *Walters v. Hutchins*, 29 Ind. 136; 2 Black Judg., section 688. The cause of action so pleaded as a counter-claim, and submitted to arbitration, being one entire indivisible wrong, the appellants could not split it up and use a part of it in that action as a defence, and the residue in this one. *Wright v. Anderson*, 117 Ind. 349; 2 Black Judg., section 738.

The appellees Bass and Lund, not being parties to the former action, would not have been affected by a judgment rendered thereon had the cause proceeded in the regular way. *Jones v. Vert*, 121 Ind. 140; and the award is in no way more effective against them than a judgment would have been.

If the appellants, Baltes and Nelson, are at all affected by the result of the former litigation, it must be upon the theory that they are deemed in law to have received satisfaction, or to have elected to rely upon their counter-claim against the Bass Foundry and Machine Works, to the abandonment of the others, and not upon the doctrine of *res judicata* applicable alone to parties and privies in person or estate.

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The authorities clearly establish the proposition that the appellants might have sued each of the appellees separately, and that a former judgment in favor of one of the defendants in such action would have been no bar in favor of the other defendants. The complication in this case arises out of the fact that the former action, set up in the answer, was connected with other causes of action, and that all the causes of action and defences were merged in one award.

The answers expressly charge that the award returned was in full settlement of all matters submitted to the arbitrators, which, of course, included the cause of action now in suit; and the presumption is that the arbitrators gave due consideration to all the causes of action mentioned in that action which were submitted to them, and that in the discharge of their sworn duty they gave the appellants the benefit of all they were entitled to recover on their counter-claim, and that the amount of such recovery not only enters into the \$223.74 awarded them, but also in reduction of whatever sum the plaintiffs in that action might otherwise have received of them.

We are of the opinion that when the appellants set up their claim for damages on account of the injuries complained of, as a counter-claim against one of the alleged tort-feasors, and blended the same with other cross-actions, as a defence to a pending action, and submitted the whole controversy to arbitration, they thereby elected to rely upon such proceeding for their compensation, to the abandonment of the other tort-feasors.

The court did not err in overruling demurrers to the answers.

The plaintiffs replied to these answers : *First.* By a general denial ; and,

Second. That as to the separate answers of Bass and Lund, the arbitrators did not find or award any sum to the plaintiffs on account of the matters set up in their complaint, nor did they, in making up their award, reduce the claim of the

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Bass Foundry and Machine Works for or on account, or by reason of the counter-claim, but that they based their finding solely upon the pleas of payment and set-off.

Third. That after the arbitrators had heard the evidence, the said Bond and McCulloch found for the plaintiffs in the sum named in the award, which award was drawn up and signed by them, and thereupon the arbitrators separated; that afterward Bond and McCulloch procured the attorney of the Bass Foundry and Machine Works to draw up another award, which was then signed by them in the absence of the other arbitrator, without his knowledge or consent, and that the latter award was the only one delivered to the parties.

Demurrers were sustained to the affirmative paragraphs of reply, and afterwards the general denial was withdrawn and judgment for the defendants rendered for want of a reply.

The facts provable under the second paragraph were admissible under the general denial, and, therefore, the ruling of the court, being correct at the time it was made, did not become erroneous because of the subsequent withdrawal of the general denial. *Cincinnati, etc., R. W. Co. v. Smith*, 127 Ind. 461; *Kidwell v. Kidwell*, 84 Ind. 224.

We have, however, examined the paragraph of reply and are of the opinion that it does not state facts sufficient to withstand the demurrer.

The answers to which it was addressed show that everything connected with the then pending action was submitted to the arbitrators, and that their award covered the whole ground of the controversy. The reply does not dispute the fact that all demands, including that embraced in the counter-claim, were submitted to and considered by them, but simply that they did not award the plaintiff anything on that account. Under such circumstances it was not competent to inquire into the reasons or methods by which the award was made up, or to insist that it did not include all the causes of action and disputes submitted to them. *Stipp v. Washington Hall Co.*, 5 Blackf. 473; *Gardener v. Oden*, 24 Miss.

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382; *Anon.*, 3 Atk. 644; *Johnson v. Durant*, 4 C. & P. 327; 1 Wharton Ev., section 599.

The ruling of the court upon the demurrer to the third paragraph of reply presents a question of some difficulty, owing to the meager statement of facts with reference to the nature of the separation of the arbitrators.

It seems, from the allegations of the reply, that the evidence was submitted to all three of the arbitrators, and that two of them, Bond and McCulloch, found for the plaintiffs, and that one of them drew up an award and the same was signed by both of said arbitrators, and that thereupon said arbitrators separated. The nature of the separation does not appear; for all that is alleged it may have consisted in the withdrawal of the third arbitrator, who seems not to have united with the others in the finding; or it may have been an adjournment to another time and place, or a mere temporary separation. It also alleges that after the award had been signed and the separation taken place, Bond and McCulloch procured an attorney to draw up another award in favor of the same party and for the same amount, and without consultation with the other arbitrator signed this award and promulgated the same.

We are not informed of the reasons or circumstances causing the absence of the other arbitrator, but the inference is that it was because he was not assenting to the finding. Construing this pleading as we are required to do, against the pleader, we have concluded that it is not sufficient to invalidate the award. The law unquestionably is that when arbitrators complete their work and *finally* separate, their duties and powers are at an end. What we hold is that the allegations of the reply are not sufficient to bring this case within that rule.

Judgment affirmed.

Filed Sept. 19, 1891.

The Board of Commissioners of Allen County v. Simons, Trustee, et al.

No. 15,292.

THE BOARD OF COMMISSIONERS OF ALLEN COUNTY v.
SIMONS, TRUSTEE, ET AL.

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INDIAN LANDS.—*Title in Fee Simple.*—*Taxation.*—Certain lands which by the treaty of 1818 between the United States and the Miami nation of Indians were granted or released to the principal chief of the Miami nation in fee simple, in consideration of the cession by the tribe of certain lands to the United States, are not liable for taxation while the owners of the same keep up their tribal relations with the Miami nation. The third article of the ordinance of 1787, relating to the lands and property of Indians, is in force in this State. The language of said clause is broad enough to cover the claims of individual Indians and titles held in fee simple acquired by treaty or otherwise from the United States. *State, ex rel., v. Board, etc.*, 63 Ind. 497, distinguished.

From the Allen Circuit Court.

R. C. Bell and *S. L. Morris*, for appellant.

W. G. Colerick, *S. R. Alden*, *H. Colerick*, *W. S. Oppenheim*,
P. A. Randall and *W. J. Vesey*, for appellees.

COFFEY, C. J.—The central question in this case relates to the right to tax certain lands in Allen county. The cause was tried in the circuit court before a jury, who returned a special verdict.

Among others, the following facts appear by the verdict, viz.: That Jean Baptiste Richardville, prior to the year 1818, and until his death in 1841, was the principal chief of the Miami tribe of Indians. For some time prior to the year 1818 he had, with the consent of his people, and under their law, resided upon and held exclusive possession of the land in controversy, the same being the property of the tribe of which he was principal chief, which included three sections of land, described in the third article of the treaty of 1818 between the United States and the Miami nation of Indians. By that treaty the United States agreed, in consideration of the cession by the tribe of certain

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lands to the United States, to grant or release the three sections to Richardville in fee simple. The treaty was signed by Richardville as one of the parties thereto, and, pursuant to its terms, letters patent were issued to him on the 24th day of September, 1823. By another treaty, made on the 6th day of November, 1838, the United States granted to Richardville and his family the privilege of remaining in Indiana when his tribe should remove from the State, and stipulated that he and his family should receive the annuities due them, under the terms of the treaty, at Fort Wayne. In the year 1846 all the Miami nation of Indians, except the family of Richardville, and some other families granted a similar privilege, removed from the State to the then Territory of Kansas. Richardville remained in the undisturbed possession of these three sections of land until his death. By his last will he devised the land to his daughter, La Blonde, or Mary Louise Richardville. The daughter and other descendants of Richardville remained in the possession of the land until the daughter's death, in the year 1847. By her last will she devised the land to her son, Ke-la-ke-wa-ke-ah, *alias* George Aussum, and her daughter, Mon-go-se-quah, *alias* Archange Godfrey.

Both wills were duly probated. Ke-la-ke-wa-ke-ah died and left his portion of the land to his sister, Mon-go-se-quah, and his son, Me-che-ke-no-quah, *alias* William Cass. In the year 1856 Mon-go-se-quah and Me-che-ke-no-quah, by order and judgment of the common pleas court of Allen county had partition of the land between themselves. Before the death of Richardville Mon-go-se-quah intermarried with James R. Godfrey, son of Francis Godfrey, the war chief of the Miamis, who, with his family, was also permitted by the United States to remain in Indiana. Mon-go-se-quah and her husband resided with Richardville on this land, and she and her descendants continued to reside thereon until her death, which occurred in the year 1885. Her husband is still living, and continues to reside on the land. Ke-la-ke-wa-ke-ah

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and his son Me-che-ke-no-quah have since the death of La Blonde to the present time been in the possession and occupancy of their portion of the land. There have been born to Mon-go-se-quah and her husband thirteen children, five of whom are still living, and with their families have ever since resided on this land. The families of Godfrey and Me-che-ke-no-quah are among the families mentioned in the treaty of 1854 between the Miami Indians and the United States, and after that treaty, the United States annually took a census of the family and placed upon the list Me-che-ke-no-quah, James Godfrey, Mon-go-se-quah, and all their children and grandchildren, as provided by that treaty, and annually paid to each of them, at Fort Wayne, their portion of the annuities provided for by that treaty, and in the year 1882 paid to them their portion of the amount of the principal sum agreed by the treaty to be paid. They have at all times resided upon and owned the land patented to Richardville, being his descendants. The government of the United States has never consented that they should put off their tribal relations.

By all the treaties made before his death, the United States recognized Richardville as the principal chief of the Miami nation, and as a member of that tribe. He executed, as chief of the Miami nation, the treaty of 1795, and every subsequent treaty with that nation, until the time of his death. The tribe and the whites who came among them treated and recognized him as a Miami Indian and the principal chief of the nation. James M. Godfrey is a Miami Indian, and has always been treated as such by the United States.

All the above-named and their descendants have been treated with by the United States and known as the Miamis of Indiana, and have been so enumerated. The chiefs and head men of the nation in the West, from time to time, called upon them and consulted with the descendants of Richardville whenever any question between them and the

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United States arose requiring the presence at Washington of representatives of the Miami nation. None of the owners of this land have ever become citizens of the United States or any State therein.

The Miamis of Indiana wear such clothing as is usually worn by the white people in the neighborhood where they reside. Some of them have been married by Catholic priests and some by justices of the peace, under licenses procured from State authority.

In 1886, 1887 and 1888 the children of Me-che-ke-no-quah attended public school, and in 1880 George Godfrey, a son of Mon-go-se-quah, voted at the presidential election. They speak both the Indian and English languages. In her lifetime Mon-go-se-quah caused the lands received from her mother, La Blonde, to be platted into lots, numbered from one to nine, inclusive, but the title and possession of the lots have never been out of the descendants of Richardville since his death.

For the years 1871, 1872, 1873, 1874, 1875, 1876, and 1877, lots one to nine, inclusive, were placed upon the tax duplicate of Allen county, and assessed for State and county purposes, and were duly returned delinquent.

On the 13th day of February, 1878, they were bid in for delinquent taxes by Charles H. Aldrich. The land not having been redeemed, the auditor executed to him a deed. Aldrich conveyed to the appellee in this case, and assigned to him all his rights in the premises.

Aldrich brought suit in the Allen Superior Court, after receiving his deed, to enforce a tax lien against said lands, but after the determination of the case of *Wau-pe-man-quah v. Aldrich*, reported in 28 Fed. Rep. 489, holding that the land was not subject to taxation, his suits were dropped from the docket without any final adjudication.

This suit was brought against the board of commissioners of Allen county to recover the amount paid for taxes by

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Aldrich under the assumption that the lands above named were not subject to taxation.

It is contended by the appellant that, as these lands were granted and patented to Richardville in fee simple, without any restraint upon alienation, for his own use, and not to any nation or tribe of Indians, or for their benefit, they are subject to taxation as any other lands in the State.

On the other hand, it is contended by the appellee that the Indian title to these lands was never extinguished, and as the owners of the same have kept up their tribal relations with the Miami nation, and have never become citizens of the United States, the lands are within the purview of article 3, ordinance 1787, and are not, therefore, subject to taxation by the State.

So far as we are informed by the record, no effort was ever made to tax these lands prior to the year 1871. Long acquiescence in the imposition of taxes, unexplained, raises a presumption of a surrender of the privilege of exemption. *Given v. Wright*, 117 U. S. 648. As it does not appear in the special verdict that these lands, prior to that date, had been assessed for taxation, we think it should be assumed, for the purposes of this case, that they had not paid taxes for the support of the State and county government up to that time. If, for any reason, they had been legally exempt from taxation between the year 1818 and the year 1871, the burden of showing that something had occurred between those dates which rendered them liable to taxation, rested upon the appellant.

Such reason is not found in any change in our statute upon the subject, for the statutes declaring what lands in the State shall be subject to taxation have remained substantially the same from 1848 to 1881.

It is earnestly contended by the appellant that the ordinance of 1787 is not in force in the State of Indiana, but it has been judicially determined that the third article of that ordi-

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nance is in force in this State. *Me-shing-go-me-sia v. State*, 36 Ind. 310; *Wau-pe-man-qua v. Aldrich*, 28 Fed. Rep. 489.

The third article of that ordinance contains this clause : " The utmost good faith shall always be observed toward the Indians ; their lands and property shall never be taken from them without their consent ; and in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress ; but laws founded in justice and humanity shall, from time to time, be made for preventing wrongs being done them, and for preserving peace and friendship with them."

In the month of April, 1816, Congress passed an act which provided that the people of the Indiana Territory might form a Constitution and be admitted into the Union, provided that the same, when formed, should be republican, and not repugnant to the articles of the ordinance of July 13th, 1787, which are declared to be irrevocable between the original States and the people and the States of the Territory northwest of the river Ohio, etc.

On the 10th day of June, 1816, the Territorial Legislature of Indiana enacted the following: " That we do for ourselves and our posterity, agree, determine, declare, and ordain, that we will, and do hereby, accept the propositions of the Congress of the United States, as made and contained in their act of the nineteenth day of April, eighteen hundred and sixteen, etc."

It will thus be seen, as adjudged in the cases above cited, that Indiana made a solemn compact with the United States, by the terms of which certain portions of the ordinance of 1787, among which is the clause above set out, were kept in force. This clause is a provision in favor of the Indian tribes residing on Indiana territory, and, as such, is to be liberally construed in their favor. *Choctaw Nation v. United States*, 119 U. S. 1; *United States v. Kagama*, 118 U. S. 375; *Kansas Indians*, 5 Wall. 737.

It takes no argument to prove that if the State of Indi-

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ana can tax these lands, and sell them for the non-payment of such taxes, it may deprive the owners of such lands of their title and use without their consent. This the clause of the ordinance of 1787, above set out, prohibits.

It is claimed, however, by the appellee that this case does not come within the rule laid down in the case of *Me-shing-go-me-sia v. State*, *supra*, for the reasons that it was patented to Richardville in fee simple, without any restraint upon alienation, and for his own use, and not for the benefit of a tribe of Indians.

The cases relied upon by the appellee as sustaining this position, viz., *Taylor v. Vandegrift*, 126 Ind. 325, *Lowry v. Weaver*, 4 McLean, 82, *Pennock v. Commissioners*, 103 U. S. 44, *Langford v. Monteith*, 102 U. S. 145, *Pka-o-wah-ash-kum v. Sorin*, 8 Fed. Rep. 740, *Hilgers v. Quinney*, 51 Wis. 62, *McMahon v. Welsh*, 11 Kan. 280, *Commissioners, etc., v. Brackenridge*, 12 Kan. 114, *Southwestern R. R. Co. v. Wright*, 116 U. S. 231, are not, in our opinion, in point in this case.

Those bearing upon the question under immediate consideration turn upon the construction of particular treaties and statutes, but none of them bear upon the construction to be placed upon the ordinance of 1787.

There is nothing in the language used in the clause here involved limiting it in the manner contended for by the appellee. The language is broad enough to cover the claim of individual Indians and titles held in fee simple acquired by treaty or otherwise from the United States. We are unable to discover any substantial reason for depriving an Indian of his land without his consent where he owns a fee simple title, when he would be permitted to hold it if his title were less than a fee.

The question as to whether these lands were subject to taxation by the State does not, we think, depend so much upon the question as to whether the owners hold the fee, or a less estate, as it does upon the question of their tribal relations. That the owners of this land constitute a part of

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the Miami nation, and have kept up their tribal relations, is abundantly shown by the special verdict before us. They are not citizens of the United States, and, indeed, could not rid themselves of their allegiance to their nation and become citizens without the consent of the United States. *Elk v. Wilkins*, 112 U. S. 94.

At the time the lands were granted to Richardville he was the principal chief of the Miami nation. It has been held by this court that the lands granted to Me-shing-go-me-sia, an inferior chief, were not subject to taxation by the State. It is not reasonable to presume that it was the intention of Richardville and of the government to place his lands where they could be taken without his consent, while all the other lands reserved to the Miamis were placed beyond the reach of the State.

In our opinion the lands described in the complaint in this case were not subject to taxation for State and county purposes during the period for which they were assessed. What the status of this land is now we are not called upon to decide.

We are not unmindful that the conclusion here reached is in seeming conflict with the case of *State, ex rel., v. Board, etc.*, 63 Ind. 497. That was an action by the State, on the relation of Godfrey, to compel the board of commissioners of Miami county, by writ of *mandamus*, to refund certain taxes alleged to have been illegally assessed and collected. It was held that *mandamus* was not the proper remedy. It was also held that the complaint was bad, for the further reason that it did not allege that the land upon which the tax had been assessed was reserved to the Indians as a band, and not to them individually; but the question of the effect of the ordinance of 1787 upon the lands assessed was not decided, and, so far as we know, was not considered. However, the question as to whether these lands are exempt from taxation under the treaties and laws of the United States is a Federal question, and it was expressly held in the case of

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Wau-pe-man-qua v. Aldrich, supra, that they are not subject to taxation, and that the particular tax involved in this suit was void. The reasoning in that case seems to us to be sound, and we know of no reason why we should hold the opinion rendered by the Federal court erroneous.

Judgment affirmed.

McBRIDE, J., took no part in the decision of this case.

Filed Sept. 22, 1891.

No. 14,999.

THE FIRST NATIONAL BANK OF MT. VERNON ET AL.
v. SARLLS ET AL.

INJUNCTION.—*Prevention of Erection of Building.*—*When Action will Lie.*—

Municipal Ordinance.—Where it is shown that the erection of a building, if permitted, will be in express violation of a valid municipal ordinance, although it would not be a nuisance *per se*, an individual who shows such fact, and shows in addition that its erection will work special and irreparable injury to him and his property, is entitled to relief by injunction.

SAME.—*Parties to Action.*—*Who May be Joined as Plaintiff.*—Although the plaintiffs, in such an action, are shown to be the owners of separate and distinct tenements, and thus are not united in interest with each other, yet there is one object of common interest among all of them. They all claim one general right to be relieved from that which they insist is a nuisance, and which alike affects all of them. Their common danger and interest in the relief sought authorize them to join in the action.

MUNICIPAL CORPORATION.—*Police Powers.*—*Ordinance.*—*Protecting Against Fire.*—Cities in this State possess ample power to enact and enforce reasonable ordinances to secure protection against fire. In the absence of express statutory authority, the enactment and enforcement of reasonable regulations of this character are recognized as a legitimate exercise of the police power necessary to the safety of the city. In addition to the power thus possessed, the statutes of this State confer express authority upon cities to establish fire limits, and prevent the erection of wooden buildings in such parts of the city as the common council may determine. The statutory power thus conferred is not a limitation upon the common law power of the city in this particular.

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SAME.—*Repairs of Building.—Public Safety.—Removal of Building.—Power of Municipality to Compel.—Nuisance.*—If the owner of a building proposes to make repairs or additions to it of such material or in such manner as to clearly menace the public safety or to greatly endanger adjacent property, the city authorities have ample power to interfere and prevent the making of such repairs or addition. They may also remove, or compel the removal of, wooden buildings erected in violation of a valid ordinance; not necessarily because the buildings thus erected are a nuisance, but because their erection was in violation and defiance of the law.

SAME.—*Deprivation of Power to Make Repairs.—Ordinance.—Invalidity of.*—A municipal ordinance is invalid which arbitrarily attempts to take from the owner of a frame or wooden building all power to make repairs necessary for its preservation, or necessary for its enjoyment, regardless of the effect which such repairs may have upon the public, upon adjacent property, or upon the rights of others; and applies with equal force to buildings detached and remote from all others as to those in immediate proximity to others; and not only to repairs which would tend to create danger, but also to those which would serve to remove or diminish it.

From the Posey Circuit Court.

E. M. Spencer and *W. P. Edson*, for appellants.

G. V. Menzies and *W. S. Jackson*, for appellees.

MCBRIDE, J.—This case involves the validity of the second section of an ordinance of the city of Mt. Vernon, entitled "An ordinance concerning the prevention of fires."

The first section, the validity of which is not called in question, establishes fire limits, and prescribes the material which may be used in the erection of buildings within these limits. The second section is as follows:

"Section 2. It shall be unlawful for any person to alter, repair, or rebuild any frame or wooden building situated within the limits defined and described by this ordinance, whenever the amount required to alter, repair, or rebuild shall equal or exceed the sum of three hundred dollars.

"Any person violating the provisions of this section may be fined in any sum not less than two dollars, nor more than one hundred dollars, with costs; and each day that work-

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men are employed on such building shall constitute a distinct offence."

The complaint charges, in substance, that the appellees were the owners of certain real estate in Mt. Vernon, and within the fire limits prescribed by the ordinance in question, upon which they were threatening to, and had commenced to rebuild and repair certain frame buildings, at a cost exceeding \$300, which had previously been partially destroyed by fire. The appellants (plaintiffs below) are shown to be each the owners of certain other tracts of land, either adjacent to, or in the immediate vicinity of, the appellees' building, on which valuable buildings have been erected; and they charge that, by reason of the threatened repairing and rebuilding by the appellees, the danger of the destruction by fire of their respective buildings is "greatly increased, and made more imminent, thereby diminishing the value of said plaintiffs' real estate, and increasing the rate of fire insurance thereon, to the irreparable injury and damage of the said buildings on each and all of the said pieces of real estate so, as aforesaid, owned by the plaintiffs, and is an obstruction to the free use, by the plaintiffs of their said property, and interferes with the comfortable enjoyment thereof," etc. Prayer for an injunction.

The circuit court sustained a demurrer to the complaint, and rendered judgment for costs in favor of the appellees.

Three questions are presented and discussed:

- 1st. Will injunction lie in such a case?
- 2d. If so, is there a misjoinder of parties plaintiff?
- 3d. Is the section of ordinance in question valid?

As a rule, a court of equity will not, at the suit of a city, restrain by injunction the threatened violation of an ordinance of such city regulating the erection of buildings for the purpose of greater security against damage by fire. 15 *Am. & Eng. Encyc. of Law*, 1172; *Village of St. Johns v. McFarlan*, 33 Mich. 72 (20 Am. Rep. 671); *President, etc., v. Moore*, 34 Wis. 450 (17 Am. Rep. 446); *Mayor, etc., v.*

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Thorne, 7 Paige, 261 ; *City of Manchester v. Smyth*, (N. H.) 10 Atl. Rep. 700.

Nor will the courts thus interfere, at the suit of an individual, when such interference is sought solely for the enforcement of the ordinance, and not because of special damage threatening the party asking such interference.

Some of the authorities above cited affirm that to warrant the application of the restraining power to prevent the erection of buildings in violation of a city ordinance, the act sought to be restrained must be a nuisance in fact, and not one created solely by statutory enactment, or municipal ordinance.

We can see no good reason for the distinction. Where it is shown that the erection of a building, if permitted, will be in express violation of a valid municipal ordinance, although it would not be a nuisance *per se*, an individual who shows such fact, and shows in addition that its erection will work special and irreparable injury to him and to his property, is entitled to relief by injunction.

It is only where the injury is general, and public in its effects, and no private right is violated, in contradistinction to the rights of the rest of the public, that individuals are precluded from bringing private suits for the violation of their individual rights. *Blanc v. Murray*, 36 La. Ann. 162 (51 Am. Rep. 7) ; *Wood Nuis.*, section 645 *et seq.* ; *McCloskey v. Kreling*, 76 Cal. 511 ; 23 Am. & Eng. Corp. Cases, 151 ; *Horstman v. Young*, 13 Phila. 19 ; *Rand v. Wilber*, 19 Ill. App. 395 ; *Mayor, etc., v. Hoffman*, 29 La. Ann. 651 (29 Am. Rep. 345).

In the case at bar it is charged by the averments in the complaint that the threatened act will be in violation of a municipal ordinance, and that it will work special and irreparable injury to the property of the petitioners. They have the right to maintain the action.

There is no misjoinder of parties plaintiff. While the appellants are shown to be the owners of separate and dis-

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inct tenements, and thus are not united in interest with each other, there is one object of common interest among all of them.

They all claim one general right to be relieved from that which they insist is a nuisance, and which alike affects all of them. Their common danger and common interest in the relief sought authorize them to join in the action. *Tate v. Ohio, etc., R. R. Co.*, 10 Ind. 174, and authorities there cited; *Town of Sullivan v. Phillips*, 110 Ind. 320.

The question as to the validity of the ordinance presents much greater difficulty.

There can be no doubt that in this State cities possess ample power to enact and enforce reasonable ordinances to secure protection against fire. In the absence of express statutory authority, the enactment and enforcement of reasonable regulations of this character are recognized as a legitimate exercise of the police power necessary to the safety of the city. *Baumgartner v. Hasty*, 100 Ind. 575; *Hasty v. City of Huntington*, 105 Ind. 540; *Clark v. City of South Bend*, 85 Ind. 276, and authorities cited in each; also, *Mayor, etc., v. Hoffman, supra*; *King v. Davenport*, 98 Ill. 305; *Wadleigh v. Gilman*, 12 Maine, 403 (28 Am. Dec. 188); *City of Salem v. Maynes*, 123 Mass. 372; *City of Troy v. Winters*, 4 Thomp. & C. (N. Y.) 256; *McKibben v. Fort Smith*, 35 Ark. 352; *Klingler v. Bickel*, 117 Pa. St. 326.

In addition to the power thus possessed, clause 32, of section 3106, R. S. 1881, enumerating the powers conferred upon cities, confers express authority to establish fire limits and prevent the erection of wooden buildings in such parts of the city as the common council may determine. The statutory authority is still further extended by clause 5 of the same section, and by section 8155, known as the "General Welfare" clause.

Counsel for the appellee, insist, however, that the enactment of the statutes in question served as a limitation upon the power of the city; that the powers therein enumerated,

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and more, belonged to the city at common law, and that by the statutory enumeration of certain specific powers, all others not thus enumerated are excluded. *Expressio unius est exclusio alterius* has no application. The statute, in so far as it enumerates common law powers previously possessed by the municipality, is merely declaratory of the common law. But while it is no doubt competent for the Legislature, in creating such corporations, to deprive them of all common law police power and enact that they shall possess and exercise such only as are conferred by statute, such intention of the Legislature will not be inferred simply because some of the common law powers are enumerated, while no mention is made of others.

In the exercise of these powers, they may not only prescribe where wooden buildings may, and where they may not, be erected, but they may undoubtedly exercise a reasonable control over the making of repairs on all buildings, whether of wood or not, and may prevent the use of inflammable or otherwise dangerous material in making such repairs.

It can hardly be doubted that if the owner of a building proposed to make repairs or additions to it of such material or in such manner as to seriously menace the public safety, or to greatly endanger adjacent property, the city authorities have ample power to interfere and prevent the making of such repairs or additions. *City Council, etc., v. Louisville, etc., R. R. Co.*, 84 Ala. 127; *King v. Davenport, supra*.

They also have full power to abate nuisances, and may, if necessary, remove or compel the removal of buildings which have for any cause become nuisances, by getting in such condition that they greatly endanger the public health or safety, or the safety of adjacent property, provided the danger inheres in the building, and not simply in the use to which the building is put.

Here, also, although the statute gives ample authority, they have, without statutory authority, ample power at com-

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mon law to cause the abatement of the nuisance; and, if it can not be otherwise abated, they may destroy the thing which constitutes or creates it. *Baumgartner v. Hasty, supra*, and authorities cited.

They may also remove, or compel the removal of, wooden buildings erected in violation of a valid ordinance; not necessarily because the building thus erected is a nuisance, but because its erection was in violation and defiance of the law, and its owner can not complain when the law is vindicated by its removal. If it were possible to so prepare wood that it would be absolutely non-inflammable, and that a building erected of it would be fire-proof, and safer than one erected in the ordinary way of stone or brick, a building thus erected of wood, in violation of a valid ordinance enacted under clause 32, of section 3106, *supra*, forbidding such erection, would be as much subject to removal, or destruction by the authorities as if it were constructed of wood not thus prepared.

It is manifest, therefore, that the right to remove or destroy the building thus erected in violation of an ordinance does not grow out of the fact that it is a nuisance, as a building made out of such material, if otherwise skilfully and properly constructed would be as safe, or safer, than one built in the ordinary way, of stone and brick, and could not be a nuisance. As is said in *Baumgartner v. Hasty, supra*: "A municipal corporation has no power to treat a thing as a nuisance which can not be one." See, also, *Wood Nuisances*, 823; *Yates v. Milwaukee*, 10 Wall. 497; *Matter of Jacobs*, 98 N. Y. 98 (50 Am. Rep. 636).

The power in such case to compel the removal of the building grows solely out of the fact that its erection was in violation of the ordinance.

The discovery of a process by which wood could be made non-inflammable, and in all respects as safe to be used in the construction of buildings as stone, or brick, or iron, would end the common law power of the city to prohibit the

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erection of wooden buildings, or its power under the general welfare clause, while under the statute that power would still exist, simply because the material was wood, and not at all because it was dangerous.

So with the power to remove buildings already erected. There is no express legislation on the subject, and such powers as the city has are its common law powers, reinforced by the general welfare clause of the statute.

As above shown, a building erected in violation of a valid ordinance may be removed without reference to its character; but with this exception, cities can only condemn as nuisances, and compel the removal of buildings which are in themselves, for some reason, dangerous or hurtful.

The author of a valuable work on the law of nuisances states the law as follows: "Nor does the power to abate nuisances warrant the destruction of valuable property which was lawfully erected, or anything which was erected by lawful authority. It would, indeed, be a dangerous power to repose in municipal corporations to permit them to declare by ordinance or otherwise anything a nuisance, which the caprice or interest of those having control of its government might see fit to outlaw, without being responsible for all the consequences, and, even if such power is expressly given by the Legislature, it is utterly inoperative and void, unless the thing is in fact a nuisance, or was created or erected after the passage of the ordinance, and in defiance of it." Wood Nuis. 823. See, also, the opinion by Justice MILLER, in *Yates v. Milwaukee*, *supra*.

This may serve to indicate the scope of the common law powers of the city in this direction, and the additional powers given by the statute.

At common law they are only authorized to interfere with the erection or repair of buildings far enough to prevent the doing of that which from its nature would have a tendency to create or enhance danger.

There is in this State no statute purporting to give to

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cities any power to prevent the repair of wooden buildings. If they have such power it is derived either from the general welfare clause, or it is an incident of their common law police power. The section of the ordinance in question, if valid, absolutely prohibits the altering or repairing of all frame or wooden buildings within the fire limits in all cases where the cost of altering or repairing will equal or exceed three hundred dollars. It makes no difference what material is to be used in making the repairs, or what the effect may be on the building. Repairing with fire-proof material is equally prohibited with repairs from dangerous and inflammable material. A repair which would tend to diminish danger falls under the ban equally with those the tendency of which would inevitably increase it.

It makes no difference whether the building was erected before or after the establishment of fire limits, or what its value is. Its value may be trifling. It may be a mere wreck or remnant, which \$300 would practically rebuild, or it may be valuable, worth many thousands of dollars, and the cost of the repairs, although \$300 or more, relatively insignificant. It may also be that no other building is near it to be affected or endangered.

As we have heretofore said, we do not doubt that cities may exercise a reasonable control over the making of repairs to buildings, and may prevent alterations and repairs which would create nuisances. This they can do even in the absence of statutory authority, in the exercise of the police power. And where fire limits are established they may doubtless prevent the repair of a wooden building within such limits, when to repair would practically be to rebuild, whether such repairs would create a nuisance or not. They can not, however, at least without express statutory authority, enforce a general, sweeping prohibition of all repairs. Whether a statute attempting to confer such power would be constitutional we need not, of course, decide in this case,

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but a consideration of some of the possible effects of such an ordinance may well suggest a query of that character.

To repair a building means simply to restore it to a sound condition. The natural and probable effect of repairing; if carefully done, would be to diminish danger, instead of to increase it. Certainly a building so much injured or otherwise out of repair as to require \$300 to repair it is more likely to endanger the public and surrounding property than if put in proper repair.

If it is lawful to maintain it without repairs, how can the police power afford any justification for a refusal to allow its owner to remedy the effects of accident or decay and restore it to a sound condition?

To hold that this was a proper exercise of the police power would be to pervert entirely the use of that power which is designed to protect society and prevent the doing of things inimical to its well-being.

Such an ordinance might in many cases compel the owner of valuable property to stand by and allow it to become valueless, and a nuisance, without the power to prevent it. The accidental destruction or removal of a roof, which it would cost \$300 to replace, might thus reduce valuable property to the condition of a mere heap of material. It is not simply a restraint on a noxious or improper use of property by its owner, but prohibits him doing that which alone will in many cases save his property from becoming a noxious and dangerous thing. Instead of restraining him from so using it as to make it pernicious to his neighbors, it would compel him by inaction to allow it to become and remain so. It might unquestionably, in many cases, amount to a taking of the property of the citizen without due process of law, and without the sanction of that overriding necessity by virtue of which at times the right of the individual may be sacrificed for the public good.

In *Matter of Jacobs*, 98 N. Y. 98 (50 Am. Rep. 636), Justice EARL, speaking for the court, says: "The consti-

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tutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated; it is owned and kept for some useful purpose, and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property can not be conceived; and, hence, any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property. The constitutional guaranty would be of little worth, if the Legislature could, without compensation, destroy property or its value, deprive the owner of its use, deny him the right to live in his own house, or to work at any lawful trade therein. * * *

"In *Pumpelly v. Green Bay Co.*, 13 Wall. 166 (177), MILLER, J., says: 'There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the Constitution.' * * But the claim is made that the Legislature could pass this act in the exercise of the police power which every sovereign State possesses. That power is very broad and comprehensive, and is exercised to promote the health, comfort, safety and welfare of society. Its exercise in extreme cases is frequently justified by the maxim *salus populi suprema lex est*. It is used to regulate the use of property by enforcing the maxim *sic uteri tuo, ut alienum non laedas*. Under it the conduct of an individual and the use of property may be regulated so as to interfere, to some extent, with the freedom of the one and the enjoyment of the other; and in cases of great emergency, engendering overruling necessity, property may be taken or destroyed without compensation, and without what is commonly called due process of law. The limit of the power can not be accurately defined, and the courts have not been able or willing definitely

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to circumscribe it. But the power, however broad and extensive, is not above the Constitution. When it speaks, its voice must be heeded. It furnishes the supreme law, the guide for the conduct of legislators, judges and private persons, and so far as it imposes restraints the police power must be exercised in subordination thereto.

"In Potter's Dwarries on Statutes, 458, it is said that 'The limit to the exercise of the police power can only be this: the regulation must have reference to the comfort, the safety, or the welfare of society.'"

In *Inhabitants, etc., v. Mayo*, 109 Mass. 315 (319), COLT, J., says: "The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of health, or protection against a threatened nuisance."

In *Slaughter-House Cases*, 16 Wall. 36 (87) FIELD, J., says: "Under the pretence of prescribing a police regulation the State can not be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgment."

In *Coe v. Schultz*, 47 Barb. 64, a learned judge, speaking of the constitutional limitations upon the police power, says: "I am not willing to concede that the Legislature can constitutionally declare an act or thing to be a common nuisance which palpably, according to our present experience or information, is not and can not be, under any circumstances, a common nuisance, by the common-law definition, or common-law decisions. * * * Under the mere guise of police regulations personal rights and private property can not be arbitrarily invaded, and the determination of the Legislature is not final or conclusive."

The author of Tiedeman Limitations of Police Powers says: "An arbitrary interference by the government, or by its authority, with the reasonable enjoyment of private lands, is a taking of private property without due process of law, which is inhibited by the Constitution. * * *

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One can lawfully make use of his property only in such a manner as that he will not injure another. Any use of one's land to the hurt or annoyance of another is a nuisance, and may be prohibited." Section 122.

"But the police power of the Legislature, in reference to the prohibition of nuisances, is limited to the prohibition or regulation of those acts which injure or otherwise interfere with the rights of others. The Legislature can not prohibit a use of lands, which works no hurt or annoyance to the neighbors or adjoining property. The injurious effect of the use of the land furnishes the justification for the interference of the Legislature. The legislative prohibition or regulation of the use and enjoyment of one's private property in land is in violation of constitutional principles, which is not confined to the prevention of a nuisance. A certain use of lands, harmless in itself, does not become a nuisance because the Legislature has declared it to be so." Section 122a.

This author also tersely and correctly states the full scope of restrictive police regulations, when confined within their proper limits, substantially as follows: To compel every one to so use his own, and so conduct himself, as not to injure others or infringe upon their rights.

Tried by these tests, the second section of the ordinance in question, in so far as it relates to the repair of wooden buildings, is clearly invalid. It arbitrarily attempts to take from the owner of property all power to make repairs necessary for its preservation, or necessary for its enjoyment, regardless of the effect which such repairs may have upon the public, upon adjacent property, or upon the rights of others; and applies with equal force to buildings detached and remote from all others as to those in immediate proximity to others; and not only to repairs which would tend to create danger, but also to those which would serve to remove or diminish it.

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It will not be contended by any one that the establishment of fire limits will justify the condemnation and removal of wooden buildings previously constructed, simply because they are wooden buildings. Before their destruction or compulsory removal can be justified they must become nuisances.

Yet this ordinance, by forbidding repairs, would accomplish by indirection what could not be done directly. It would first compel the owner to allow it to become and remain a nuisance, and then punish him for so doing by destroying or removing his property.

We have not been able to find an authority anywhere which would sustain appellants' position in this case. The case of *Brady v. Northwestern Ins. Co.*, 11 Mich. 425, cited by them, holds that under the charter of the city of Detroit, which expressly authorized the enactment of an ordinance forbidding repairs to wooden buildings, an ordinance which forbade such repairs without the consent of the common council, was valid. That case, in two essential particulars, differed from the case at bar: 1. The charter gave express authority to enact the ordinance; and, 2. The ordinance then in question was not prohibitory, but allowed repairs when consent was first obtained of the common council. The opinion was by a divided court, Campbell, J., filing a strong dissenting opinion, holding the ordinance invalid as applied to a building erected before its enactment, notwithstanding the charter.

The case of *King v. Davenport*, *supra*, was also a case where the charter of the city of Jacksonville conferred express authority, and the ordinance in question only forbade the building or repairing of buildings within the fire limits with other than fire-proof material. A party removed an old shingle-roof from her building, and replaced it with a new shingle-roof. Failing to remove it upon notice, the city marshal removed it. It was held that under the express authority conferred by the

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charter the ordinance was valid. The ordinance in that case, instead of prohibiting repairs, simply prescribed the material that might be used in making repairs. These two cases are the only ones cited by the appellants upon the question of the right to prohibit repairs, although many others are cited upon the general power of the city in the establishment of fire limits, and their power to prohibit the erection of buildings. Other authorities bearing upon the right to prohibit or to regulate repairs are as follows: Horr and Bemis Municipal Police Ordinances, p. 214, says: "The making of ordinary repairs to existing buildings can not be prohibited. They must amount to additions or material alterations. Re-shingling a building, for example, is an ordinary repair." See, also, to the same effect, *Regina v. Howard*, 4 Ont. 377; *Brown v. Hunn*, 27 Conn. 332; *Stewart v. Commonwealth*, 10 Watts, 307.

The case of *Ex parte Fisk*, 72 Cal. 125, was a case where an ordinance prohibited the alteration or repair of wooden buildings within the fire limits without permission or authority from the fire wardens. The court discusses, at some length, the provision that certain officers may grant permission to make repairs, and says: "It is clear, however, that a literal compliance with a regulation prohibiting the repairing of a wooden building might work, in some instances, useless hardships. The repair of a leaking roof or broken window would be necessary to the comfort and health of a family, without enhancing the danger which the framers of the ordinance sought to provide against; and repairs of a more extensive character might be made to particular houses, standing in particular localities, without increasing the fire risks. And it is equally clear that no general rule could be established beforehand that would meet the emergencies of individual cases. Therefore the power to give relief in particular instances is conferred on certain officers; and it is not to be presumed that they will exercise it wantonly, or

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for purposes of profit or oppression." The court concludes that the conferring of the discretionary power on the fire wardens was valid, and sustained the ordinance.

The case of *City Council, etc., v. Louisville, etc., R. R. Co.*, 84 Ala. 127, was a case where an ordinance prohibited repairing the roof of buildings within the fire limits with wood or other inflammable material. Like *King v. Davenport, supra*, it did not prohibit making repairs, but forbade the use of certain material in making them.

In *State v. Schuchardt*, 42 La. Ann. 49, it is held that a legislative mandate, authorizing a municipal corporation to prevent the reconstruction in wood of old buildings within certain limits, does not include the mandate to prevent the repairing with shingles of the roofs of buildings originally covered with shingles.

It will be observed, on examining these cases with others that more or less directly bear upon the question involved, that there is wide diversity in the interpretation given to the law in the different courts. Some go so far as to deny the power to interfere at all with the making of ordinary repairs. The weight of authority, however, is clearly with those cases which recognize the power of municipal corporations to regulate the making of repairs to buildings, and treat it as a legitimate exercise of the police power, but none of them go to the extent of sustaining the power of absolutely prohibiting repairs, as is sought to be done in this case.

The complaint contains no averments showing the value of the building proposed to be repaired. It is possible that the part remaining will be of small value, and that this is a case where to repair will mean a substantial rebuilding of the structure. If so, however, it would have been easy to show such fact by specific averment. As it is, we are unable to say, from any averment in the complaint, that the proposed repairs, costing \$300 or more, may not be very small, compared with the value of that portion of the building which

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remains, and that to restore or rebuild it may not be to preserve valuable property, and to prevent instead of create a nuisance.

In our opinion the circuit court did not err in sustaining the demurrer to the complaint.

Judgment affirmed, with costs.

Filed Sept. 22, 1891.

No. 14,842.

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TRUST AND TRUSTEE.—*Cestui que Trust.*—*Decree.*—Where a trustee, who represents the beneficiaries, is in court, the decree rendered binds them in so far as it affects the trust property.

MORTGAGE.—*Foreclosure.*—*Decree, who Bound By.*—*Trustee and Beneficiaries.*—*Judgment Creditors.*—*Partition.*—*Counter-Claim.*—At an execution sale the judgment creditors chose of their own members certain ones as trustees. The judgment debtor's land was purchased by those so chosen, as trustees for themselves and the other creditors, and the sheriff's certificate was issued to them as trustees. In a suit to foreclose a mortgage executed by the judgment debtor the trustees were made parties.

Held, that the decree of foreclosure rendered therein, adjudging the mortgage to be a paramount lien, was binding on the trustees and the other creditors as the beneficiaries of the trust.

Held, also, that even if the judgment creditors were not parties to the foreclosure suit through their chosen trustees, the decree was not a nullity, and the mortgagee had a right, in a subsequent suit, to secure a decree barring their equity of redemption. Such right may be set up as a counter-claim in a suit by all the creditors for partition of the land.

EXECUTION.—*Sheriff's Sale.*—*Judgment Creditor's Bid.*—It is sufficient to make a sheriff's sale effective, in cases where the judgment creditor is the purchaser, if the amount of the bid is properly credited upon the execution, by his direction and authority.

SAME.—*Holder of Sheriff's Certificate of Purchase.*—*Redemption from Mortgage Foreclosure.*—The holder of a sheriff's certificate of sale under execution on a judgment may redeem lands sold on a decree of foreclosure of a

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| 129 | 217 |
| 130 | 161 |
| 131 | 217 |
| 132 | 554 |
| 133 | 157 |
| 134 | 217 |
| 135 | 329 |
| 136 | 689 |
| 137 | 217 |
| 138 | 30 |
| 139 | 408 |
| 140 | 217 |
| 141 | 49 |
| 142 | 77 |
| 143 | 217 |
| 144 | 324 |
| 145 | 266 |
| 146 | 634 |
| 147 | 217 |
| 148 | 29 |

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mortgage made by the judgment debtor, the lien of which is prior to that of the judgment.

SAME.—Right of Redemption as Judgment Creditor.—Sufficiency of Application to Redeem, How Determined.—Such holder of a sheriff's certificate is entitled to redeem in the character of a judgment creditor, and not as owner, and hence the sufficiency of the application must be determined by section 772, R. S. 1881, which requires a statement specifying the amount and date of the judgment, and the amount due and unpaid.

CONSTITUTIONAL LAW.—Obligation of Contract.—Statute Reducing Interest on Redemption from Mortgage.—A statute enacted subsequently to the execution of a mortgage, reducing the rate of interest which the purchaser might receive on his bid in case of redemption from ten per cent. to eight per cent., is not unconstitutional as impairing the obligation of a contract between the mortgagor and the mortgagee.

NEW TRIAL.—As of Right.—Partition.—Where, in an action for partition, the question of title is directly put in issue and adjudicated, the unsuccessful party is entitled to a new trial as of right.

EXECUTION.—Right of Redemption.—Purchaser Under Execution.—Equitable Title.—Lien-Holder.—The title remains in the judgment debtor, not only until the right of redemption is lost, but until the power to redeem no longer exists, and the power to redeem ends only when the holder of the certificate demands a deed. The holder of a sheriff's certificate, who has taken no steps to obtain a deed, is no more than a lien-holder, regardless of the time which has elapsed since the sale. The expiration of the year allowed for redemption enlarges his rights by adding to his lien an equitable interest in the land sold. If he demands a deed, he acquires a legal title. Until he procures a deed he can not redeem as owner under section 768, R. S. 1881, but must redeem as a judgment creditor, or lien-holder, under section 772, R. S. 1881. OLDS, J., dissents.

From the Tippecanoe Circuit Court.

R. B. F. Peirce, B. T. Ristine, T. H. Ristine, H. H. Ristine, A. B. Anderson and B. Crane, for appellants.

J. McCabe, for appellees.

ELLIOTT, J.—The appellants allege in their complaint that they are the owners of an undivided interest in the land in controversy, and entitled to partition.

James McCabe, one of the appellees, alleges in his counterclaim these facts: The only interest or title of the plaintiffs is founded on a deed executed to them by the sheriff, and

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based on a sale made on the 24th day of January, 1884. The sale rests upon a judgment which became a lien on the 9th day of January, 1877, on the land in controversy, which was then owned by Matthias Van Cleave. The property was purchased by the plaintiffs Brown and Ristine, as trustees for themselves and their co-plaintiffs, and a certificate was issued to them as trustees. The title of the cross-complainant is founded on a sheriff's sale, made on a decree of foreclosure rendered in his favor against Van Cleave.

The decree foreclosed a mortgage executed to the cross-complainant by Van Cleave and his wife on the 1st day of December, 1876. The trustees, Brown and Ristine, were parties to the foreclosure suit, and it was therein adjudged that McCabe's mortgage was the paramount lien. McCabe's judgment was for nine thousand three hundred and sixteen dollars, but he bid in the property for five hundred dollars. A certificate was duly issued by the sheriff, a deed was demanded at the proper time and refused.

The counter-claim is good. For this conclusion there are at least two valid reasons. Of these in their order. Brown and Ristine were, as the confessed allegations of the counter-claim show, trustees for themselves and all their co-plaintiffs. A decree against trustees usually binds the beneficiaries, and certainly does so in a case such as this, where the evidence of title clothes the trustees with the apparent legal ownership.

It appears that, upon the sale on the judgment, the evidence of title was taken by the trustees for their own benefit as well as for the benefit of their co-plaintiffs, and as to third parties they were the ostensible legal owners of such an interest as the certificate conveyed. They can not, as against McCabe, be regarded as holders of a mere naked trust. The cases of *Gaylord v. Dodge*, 31 Ind. 41, *Adams v. La Rose*, 75 Ind. 471, and *McCoy v. Monte*, 90 Ind. 441, are not of controlling influence, for we are in this instance required to give judgment upon a case where the trustees have a benefi-

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cial interest, and were the parties to a foreclosure suit affecting the property to which they held the whole of such title or right as existed under the certificate executed by the sheriff.

In speaking of such a trustee, it was said in the case of *Kerrison v. Stewart*, 93 U. S. 155, that "If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust (*Shaw v. Norfolk, etc., R. R. Co.*, 5 Gray, 171; *Bisfield v. Taylor*, 1 Beat. 91; *Campbell v. R. R. Co.*, 1 Woods, 376; *Ashton v. Atlantic Bank*, 3 Allen, 220), or to one by a stranger against him to defeat it in whole or in part. *Rogers v. Rogers*, 3 Paige, 379; *Wakeman v. Grover*, 4 Paige, 34; *Winslow v. M & P. R. R. Co.*, 4 Minn. 317; *Campbell v. Watson*, 8 Ohio, 500. In such cases, the trustee is in court for and on behalf of the beneficiaries; and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party."

The conclusion that, where a trustee who represents the beneficiaries is in court, the decree rendered binds them, in so far as it affects the trust property, is supported by many other decisions. *Vetterlein v. Barnes*, 124 U. S. 169; *New Jersey, etc., Co. v. Ames*, 1 Beasley (N. J.), 507; *Corcoran v. Chesapeake, etc., Co.*, 94 U. S. 741; *Richter v. Jerome*, 123 U. S. 233; *Coal Co. v. Blatchford*, 11 Wall. 172; *Van Vechten v. Terry*, 2 Johns. Ch. 197; *Board, etc., v. Mineral Point R. R. Co.*, 24 Wis. 93; *Hays v. Gallion, etc., Co.*, 29 Ohio St. 330; *Mead v. Mitchell*, 5 Abbott Pr. R. 92; *McElrath v. Pittsburgh, etc., R. R. Co.*, 68 Pa. St. 37.

Our own court has sanctioned the general doctrine. *Rinker v. Bissell*, 90 Ind. 375. This general doctrine clearly applies where, as here, there is a purchase at sheriff's sale, and the creditors interested in the purchase constitute some of their own number trustees, and cause the certificate to issue to the persons chosen to represent them. The necessary in-

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ference is that the trustees so chosen represent the interests of all in the property purchased, and themselves have a beneficial interest.

We come now to the second reason indicated as supporting our declaration that the counter-claim is good, and that is this: Even if the judgment creditors were not parties to the foreclosure suit, through their chosen trustees, still the decree was not a nullity, and the appellee McCabe has a right, in a subsequent suit, to secure a decree barring their equity of redemption. If they were proper parties to the foreclosure suit, they were nothing more, for they were certainly not necessary parties. If the theory that they were not parties to the original suit be accepted as the true one, then it must follow that their general equity of redemption can be barred by an independent decree rendered in a subsequent suit. *Jefferson v. Coleman*, 110 Ind. 515, and authorities cited, p. 517; *Shirk v. Andrews*, 92 Ind. 509; *Curtis v. Gooding*, 99 Ind. 45.

As the right of the appellants to a partition depends upon their interest in the land, it was proper to plead title in the appellee by way of counter-claim, so that the entire controversy might be adjudicated in one suit, or action, for the policy of our code, as has been often decided, is to prevent a multiplicity of actions concerning the same real estate. *Ulrich v. Drischell*, 88 Ind. 354, and cases cited; *Howe v. Lewis*, 121 Ind. 110; *Faust v. Baumgartner*, 113 Ind. 139; *Indiana, etc., R. W. Co. v. Allen*, 113 Ind. 308 (3 Am. St. Rep. 650); *Woodworth v. Zimmerman*, 92 Ind. 349. It may, perhaps, be well to add that we are not, at this place, speaking of the statutory right of redemption, since that right is essentially different from the equity of redemption. *Eiceman v. Finch*, 79 Ind. 511. The difference between the right to redeem under the statute and the equity of redemption is an important and influential one. The statutory right does not come into existence until after the sale, nor, it is hardly necessary to suggest, can it be barred by a decree

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foreclosing a mortgage. But the equity of redemption exists prior to the suit, and may be barred by a decree.

The evidence given by the parties on the trial may be regarded as establishing the facts which we outline in the synopsis that follows. The judgment on which the land was sold was obtained against Van Cleave, then the owner, on the 2d day of January, 1877, and was for the sum of one hundred and sixteen dollars. The judgment on which the land was sold was held by two of the appellants, but, at the time of the sale, the sheriff had in his hands several executions issued upon judgments against Van Cleave, among them one in favor of the trustee Brown. The property was bid in by Brown and Ristine, trustees, for eleven hundred and thirty-seven dollars, but a receipt seems to have been given for only three hundred and thirty-six dollars. It appears, however, that the sum bid was applied upon the several executions in the hands of the sheriff, distributing to each a proportionate share of the avails of the sale. A certificate was issued by the sheriff to Brown and Ristine, as trustees, for all of the execution creditors, and on the 15th day of March, 1886, a deed was issued to the holders of the certificate. The mortgage to McCabe, referred to in the counter-claim, was executed to him by Van Cleave and wife on the 1st day of December, 1876. To the suit to foreclose that mortgage Brown and Ristine, trustees, were parties, and the decree adjudges that the mortgage is the paramount lien. Sale was made on the decree, and a certificate issued to McCabe on the 14th day of March, 1885. After the expiration of the year allowed for redemption, McCabe demanded a deed, but his demand was met by a refusal. On the 13th day of March, 1886, Brown and Ristine, trustees, filed with the clerk a written statement in which they asserted that, as shown by the sheriff's certificate, recorded on page 101 of the *lis pendens* record, and also by the sheriff's return to the decree certified to him, the real estate, describing it, was sold by the sheriff. They also stated that they desired

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to redeem the real estate upon the following facts: "That they had a certificate of purchase for said real estate which is a lien thereon, executed to them by Alexander Harper, sheriff, dated January 24th, 1884, recorded on page 94 of the *lis pendens* record, which said certificate was issued under and pursuant to a sale of the land made by the sheriff under a writ of execution issued to the sheriff under the hand of the clerk and the seal of the court, upon the judgment of Alexander M. Robertson and John M. Perry, as appears from the sheriff's return to said execution as the same is recorded on page 276, of execution docket number 8." The statement is signed by Brown and Ristine as trustees in "trust for Alexander M. Robertson, John M. Perry, Robert B. Burton, William T. Burton, Charles Ferriman, John S. Brown, Aaron H. Blair and John S. Brown, surviving partner." But no specification of the amount of the judgment was made in the statement, nor was it shown what amount was due and unpaid. The certificate of redemption was also read in evidence, from which it appears, among other things, that Brown and Ristine, trustees, paid five hundred and forty dollars to the clerk.

In discussing the ruling on the counter-claim we have disposed of some of the questions presented by the ruling upon the motion for a new trial for cause, and we shall not again discuss them.

We are satisfied that the sheriff's sale to Brown and Ristine was not invalid, although no money was actually paid to the sheriff by them in their character of purchasers. It is sufficient to make a sheriff's sale effective, in cases where the judgment creditor is the purchaser, if the amount of the bid is properly credited upon the execution, by his direction and authority. There is no reason for going through the useless ceremony of handing the money to the sheriff and then receiving it back from him. *Burton v. Ferguson*, 69 Ind. 486; *Clossen v. Whitney*, 39 Minn. 50.

It is undoubtedly true that a party who assumes to avail

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himself of the statutory right of redemption must comply with the statute. *Liggett v. Firestone*, 96 Ind. 260; *Rucker v. Steelman*, 73 Ind. 396. The right is purely a statutory one, and, while a redemption is not to be defeated because of an unimportant or immaterial deviation from the requirements of the statute, still it can not be successfully asserted without a substantial compliance with the statutory requirements.

The verified statement made by the appellants was, so far as the character of the redemptioners is concerned, a substantial compliance with the statute; it shows that they sought to redeem in the character of the holders of the sheriff's certificate. Their character was evidenced by the certificate described by them, and it was unnecessary for them to more fully describe the character in which they asked to redeem. The sheriff's certificate did not, it is true, vest a title in them, but it did evidence a lien. *Goss v. Meadors*, 78 Ind. 528; *Elston v. Piggott*, 94 Ind. 14. It is a legal instrument of force, and evidences a right in the holder somewhat higher than the general judgment lien, but, nevertheless, a right resting upon the judgment, and owing its principal strength to the judgment. It can not be possible that the holder of a certificate has neither such a lien nor such an interest as will enable him to redeem. His certificate gives him something more than a naked general judgment lien, for, while it does not vest title in him, it does vest such right as may, upon the happening of a designated legal event, ripen into a title. The sale, when consummated by the execution of a deed, takes up the judgment so that no sale of the same property can again be made upon it by the owner of the judgment on which it was once sold. *Horn v. Indianapolis Nat'l Bank*, 125 Ind. 381.

If the property can not be again subjected to sale after title has passed, it must be for the reason that the owner of the certificate has a right superior to that of the judgment on which the certificate is based, for it is inconceivable that a

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judgment lien can be taken up by an interest, lien or estate not greater than it is itself. The greater may merge the less, but not the less the greater. It results that the holder of a certificate of sale has, if in other respects within the statute, a right to redeem, and that a description of himself as the holder of a sheriff's certificate issued on a sale sufficiently describes his character, but whether such a statement is sufficiently specific in other respects is quite a different question.

The statement required by the statute, with which the appellants assumed to comply, is more than a mere general assertion that the party seeking to redeem holds a lien. If, therefore, the appellants have a lien only, the statement is insufficient. In such a case as this, as our cases uniformly hold, the owners of the sheriff's certificate did not obtain a title to the land. *Felton v. Smith*, 84 Ind. 485; *Brown v. Cody*, 115 Ind. 484 (486); *Shirk v. Thomas*, 121 Ind. 147 (16 Am. St. R. 381); *Bodine v. Moore*, 18 N. Y. 347. During the year of redemption the holder of the certificate has "no claim or right except to be repaid the amount of his bid with the rate of interest prescribed in the statute." *Bodine v. Moore*, *supra*; *Neff v. Hagaman*, 78 Ind. 57; *Brown v. Cody*, *supra*. In *Neff v. Hagaman*, *supra*, it was said: "The title of the judgment debtor continues until the year for redemption has expired." The same rule was thus expressed in *Hasselman v. Lowe*, 70 Ind. 414: "The sheriff's certificate of the sale does not convey a title to the land sold, but simply an obligation upon which a title may be obtained after the expiration of a year from the sale, unless the land is redeemed within that time." In *Elston v. Castor*, 101 Ind. 426, it was said: "It is settled that the sheriff's certificate does not convey a legal title to the purchaser." Other cases assert a like doctrine. *Elston v. Piggott*, *supra*; *Wilhite v. Hamrick*, 92 Ind. 594. These decisions close the question as to the nature of the right of the holder of a sher-

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iff's certificate, and establish the rule that he has a lien, and not a title. But if it were granted that the appellants were the owners, and not mere lien-holders, the concession would do them little good, for, if they redeemed as owners, the property would be subject to re-sale, and the redemption would not vest title in them. *Hervey v. Krost*, 116 Ind. 268; *Green v. Stobo*, 118 Ind. 332.

We adjudge that the holder of a sheriff's certificate acquires a lien, and that he has a right to redeem as a lien-holder, but not as an owner. As the owner of a sheriff's certificate can only redeem in the capacity of a holder of a lien, he must do what the statute requires of a party who asserts a right to redeem as a lien-holder.

It is difficult to designate the precise character in which the holder of a sheriff's certificate may redeem. He can not, as we have seen, redeem as an owner. Nor can he redeem as the holder of a mechanic's lien, a mortgage lien, or any specific lien of that nature. This is so obvious from the language of section 774, R. S. 1881, that discussion is unnecessary; but if the case did fall within that section, still the redemptioner must do what is required of judgment creditors as nearly as the nature of his lien will admit. We hold that if such a person is entitled to redeem at all it is in the character of a judgment creditor. Either this must be affirmed or it must be affirmed that there is no right to redeem. We have, however, shown that he has a right to redeem, and hence it must follow that the right is essentially that of a judgment creditor. This conclusion gives just effect to the statute, harmonizes its provisions, and carries into execution the intention of the Legislature. The basis of the lien is the judgment upon which the sale was made, and the certificate is but a step towards perfecting the lien, so that it may, by the failure to redeem, be transformed into a title. The certificate represents no fixed sum of money; its foundation and vital element is the judgment, and, in order to ascertain what that sum is, the judgment must be so de-

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scribed and so designated as that interested parties may know from an examination of the statement required of the redemptioner the amount and date of the judgment, and what part, if any, has been paid. The courts can not supply omissions or remedy defects by intendment.

The owner of a certificate remains, we repeat, the holder of a lien, and of a lien only. His character is not, under the firmly settled rules established by the cases to which we have referred, transformed into that of an owner until the sale is consummated by the execution of a deed. *Stephens v. Illinois, etc., Ins. Co.*, 43 Ill. 327 (331). The basis of his lien is the judgment, for, without a judgment, his certificate would be absolutely ineffective. In itself it has no power. If, therefore, there is no change of character and no change of lien, it must follow that it is the lien of the judgment that gives the holder of a certificate a right to redeem. The execution of the certificate is at most a strengthening of the judgment lien, and is no more than a step towards its enforcement. It creates no new character nor any new lien. It seems clear, therefore, that the mere exhibition of a sheriff's certificate, or a simple reference to it, is not sufficient. Nor is the mere statement that the person holding such certificate proposes to redeem sufficient to show a right to make a redemption under the statute. Much more is required.

To hold a reference to a sheriff's certificate sufficient would be to adjudge that the owner of a certificate may redeem without showing the specific facts required by the statute, and this would practically destroy one of its chief provisions.

In our opinion it is necessary to show—what, indeed, section 772 explicitly requires—the amount and date of the judgment as well as the amount due and unpaid. Requirements such as these are regarded by all of the cases that we have been able to find as matters of importance, for those decisions assert that the failure to make such specification in the verified statement is fatal to the attempted redemption. *Eiceman v. Finch, supra*; *Liggett v. Firestone, supra*; *Buser*

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v. *Shepard*, 107 Ind. 417; *Tinkcom v. Lewis*, 21 Minn. 132; *Thornley v. Moore*, 106 Ill. 496; *Morss v. Purvis*, 68 N. Y. 225; *Haskell v. Manlove*, 14 Cal. 54; *Spoor v. Phillips*, 27 Ala. 193.

The case of *Tinkcom v. Lewis*, *supra*, is strongly in point. In that case the right to redeem was asserted by the holder of a sheriff's certificate, and it was held that he must show, by affidavit, the amount of his claim. It was said by the court, in speaking of the provision of the statute requiring the statement of the amount of the lien, that "The object of this requirement is to provide the evidence whereby a junior creditor may know the amount necessary to be paid to the senior creditor upon a redemption from him."

It is evident to our minds that whatever view may be taken of the matter, or whatever section of the redemption statute may be applied to the case, it must be held that the requirements of the statute as to the statement of the amount and date of the lien has not been complied with, and that the attempt of the appellants to redeem was ineffectual.

A question as to the validity of the act of 1881 arises upon the contention that, as the mortgage of the appellee was executed at a time when the law required redemptioners to pay ten *per centum* interest, the subsequent reduction of the rate of interest to eight *per centum* is in violation of the provision of the Constitution forbidding the enactment of any law impairing the obligation of contracts. The mortgage of the appellee undoubtedly constituted a contract, and it is quite clear that the Legislature could not enact any law which impaired its obligation. *Helphenstine v. Meredith*, 84 Ind. 1; *McGlothlin v. Pollard*, 81 Ind. 228; *Parkham v. Vandeventer*, 82 Ind. 544; *Lease v. Owen Lodge*, 83 Ind. 498. But this principle does not settle the question which confronts us here, for the question here is whether the right to redeem is part of the contract or is matter affecting the remedy only. It may well be conceded that an estate in land can not be enlarged or decreased to the injury of a

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mortgagee and yet, not follow that it is not within the constitutional power of the Legislature to change the law providing the terms upon which a redemption from a foreclosure sale may be made. The precise question here presented may be decided, as is evident from what has just been said, without touching the rule laid down in the cases cited. We, therefore, lay out of consideration those cases without further comment and proceed to an examination of the cases which do bear directly upon the question.

In *Scobey v. Gibson*, 17 Ind. 572, it was held, by a divided court, that the redemption law of 1861 was, in so far as it applied to contracts made before its enactment, in conflict with the Federal Constitution. The decision was placed entirely upon that ground, and if that ground has fallen away the decision must go down, so that our inquiry must be whether the foundation has been taken from under that decision. This has been done in the case of *Davis v. Rupe*, 114 Ind. 588, for that case, in effect, overrules the earlier.

It is, however, to be said of the decision in *Davis v. Rupe*, *supra*, that it leaves open the question as to whether, as against a mortgagee, the right of redemption can be materially changed by a statute enacted subsequent to the execution of the mortgage.

The case of *Travellers Ins. Co. v. Brouse*, 83 Ind. 62, is discriminated from the case where no mortgage rights were involved, but the line of reasoning pursued leads to the conclusion that even as against a mortgagee a change may be made in a statute providing for the redemption of land sold upon a decree of foreclosure. The question, as it is here presented has, however, been expressly decided by the Supreme Court of the United States. In the case of *Connecticut, etc., Ins. Co. v. Cushman*, 108 U. S. 51, it was held that a statute reducing the rate of interest from 10 per cent. to 8 per cent. was not in conflict with the Constitution. We feel bound to follow the decision of that court, since with it rests the ultimate decision of such questions as the one before us. It is proper to say

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that if the statute had assumed to reduce the rate of interest below that which the contract evidenced by the mortgage entitled the mortgagee to demand, we should be inclined to hold that there was an impairment of a contract obligation ; but we have no such case before us. It is important to keep in mind that when the mortgage to McCabe was executed there was a redemption law in force, and that there was simply a change in that law ; so the case is unlike one where there was no redemption law in existence when the mortgage was executed.

Our ultimate conclusion upon this point is that the trial court correctly held that the sum paid to the clerk by the appellant was sufficient. But as our conclusion is against the appellants upon the question of the efficacy of their attempt to redeem, we must adjudge that the finding of the trial court is right, and that the motion for a new trial, for cause, was properly denied.

There remains for consideration the question presented by the ruling denying the appellants' motion for a new trial as of right. The counter-claim of the appellee presented for decision the question of title to the land in dispute. The theory on which his pleading proceeds, and on which he obtained a decree, is that he had a fee simple title. To that theory he must be held. The appellants were held to it in the trial court, for the issue tendered was adjudicated against them. It is provided in the decree, among other things, that "It is ordered, adjudged, and decreed, that said title in fee simple of said James McCabe be and the same is hereby quieted against all claims and rights of the plaintiff in and to the same." This is an adjudication that McCabe is possessed of the highest title known to the law, and it is moreover the title he asserted in his counter-claim. It is impossible, under our decisions, to avoid the conclusion that the court erred in overruling the motion for a new trial as of right. *Kreitline v. Franz*, 106 Ind. 359 ; *Gullett v. Miller*, 106 Ind. 75 (78) ; *Hammann v. Mink*, 99 Ind. 279 ; *Physio-*

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Medical College v. Wilkinson, 89 Ind. 23; *Cooter v. Baston*, 89 Ind. 185, and cases cited.

Judgment reversed, with instructions to sustain the appellants' motion for a new trial as of right.

Filed March 11, 1891.

ON PETITION FOR A REHEARING.

MCBRIDE, J.—The appellants ask for a rehearing and for a modification of the opinion in so far as relates to the sufficiency of the application to redeem from the McCabe sale. In the original opinion it is held that the application to redeem is made in the character of lien-holder, and that the sufficiency of the application must be determined by section 772, R. S. 1881.

The application in this case was by the holder of a sheriff's certificate, and more than two years after the expiration of the year allowed for redemption from the sale. The appellants insist that after the expiration of the year for redemption they were no longer mere judgment creditors or lien-holders, but had by such lapse of time become the equitable owners of the land, and as such entitled to redeem under section 768, R. S. 1881. Although the time for the redemption of the land from the sale had long expired, it does not appear that there had been any demand for a deed.

Appellants' position is that this was not necessary to entitle them to redeem under that section, but that their rights as lien-holders terminated with the expiration of the year, and then enlarged and ripened into "an equitable estate in the lands." They say, that "One who has such rights and interest in lands that he has the legal right to call for a deed, is the equitable owner of such lands."

The appellants are right in asserting that with the expiration of the year allowed for redemption the holder of a sheriff's certificate for land sold on execution or decretal order does acquire an equitable estate in the property. *Ketchum v. Schicketanz*, 73 Ind. 137.

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It does not follow, however, that he is, by reason of that fact alone, entitled to redeem under section 768. That section provides for redemption by the owner or his executors or administrators, or by his heirs or devisees, or by "any one holding either *the legal or equitable title.*" There is a very plain and marked distinction between an estate in lands and a title to lands.

The appellants were the owners of an equitable *estate* in the land in controversy, but, to entitle them to redeem under section 768, they were required to hold either a legal or an equitable title.

An estate in land is the degree, quantity, nature or extent of interest which a person has in it. Bouvier Law Dict.; Co. Litt., section 347; 2 Bl. Com. 103; 2 Crabb Real Prop., part 2, section 942; Preston Est. 20; Black Law Dict.; 1 Washb. Real Prop., marg. p. 45, *et seq.*

His title to it is the evidence of his right or of the extent of his interest; the means whereby the owner is enabled to assert or maintain his possession; the right of the owner, considered with reference either to the manner in which it has been acquired, or its capacity of being effectually transferred. Black Law Dict.; Rap. & Law. Dict.; Co. Litt. 345; 2 Bl. Com. 195.

The distinction between the two is discussed and plainly shown in the first eight sections of chapter 3, 1 Washb. Real Prop.

Unless, therefore, the appellants had, in addition to their equitable interest, or estate in the land, a title, they could not redeem under section 768.

Had they title? If so, when and how was it acquired? Not by the sheriff's sale, or by the sheriff's certificate. In *Hasselman v. Lowe*, 70 Ind. 414, cited in the original opinion, it is said: "The sheriff's certificate of sale does not convey a title to the land sold, but simply an obligation upon which a title may be obtained, after the expiration of a year from the sale, unless the land is redeemed within that time."

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In *Neff v. Hagaman*, 78 Ind. 57 (62), it is said: "The title of the judgment debtor continues until the year for redemption has expired."

In *Taggart v. McKinsey*, 85 Ind. 392, it was held that after the expiration of the year allowed for redemption, notwithstanding the *right* to redeem no longer exists, and the holder of the certificate has a right to demand and receive a deed, he may allow redemption from the sale. The court says: "The appellant had the right to accept such redemption money, if he chose so to do, after the expiration of one year from the date of the sheriff's sale; and if he did so, as alleged, the redemption would be as full and complete, and have the same consequences, if the sheriff's deed had not been executed, as if the redemption had been made within the year allowed by law therefor. The certificate of sale would be thereby annulled, and the sheriff's deed, subsequently executed on such certificate, would be void and of no effect." Page 395.

This could not be true if the title passed when the year for redemption expired. The effect of redemption is not to transfer title, but to prevent its passing. As long as redemption is possible the title remains in the judgment debtor, and redemption simply leaves it there. If the title actually passed to the holder of the certificate, with the expiration of the year for redemption, it could only be divested by a conveyance.

In our opinion, the title not only remains in the judgment debtor until the *right* of redemption is lost, but until the *power* to redeem no longer exists. The power to redeem only ends when the holder of the certificate demands a deed.

The holder of a sheriff's certificate, who has taken no steps to obtain a deed, is no more than a lien-holder, regardless of the time which has elapsed since the sale. The expiration of the year allowed for redemption enlarges his rights, in this: That to his lien on the land is added an

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equitable interest in the land, which his act alone may ripen into a title. His right to a deed, instead of being contingent upon the action of others, has become absolute, and depends solely upon his own action. If he has done nothing to waive his right, no act of another can thereafter, without his consent, deprive him of it, as might have been done by redemption before that time.

If he exercises his right, and demands and receives from the sheriff a deed, he thereby acquires a legal title. If, being entitled to a deed, his demand is refused, still, by virtue of his demand, he becomes the owner of an equitable title. This, because equity will regard as done that which should be done, and if he had a valid right to a deed, and has taken the necessary steps, and made a proper demand, equity will treat as actually made the deed which should have been made. Viewing him as the holder of an equitable title, it will lend its aid in the enforcement of his rights, and will even quiet his title. *Stout v. Duncan*, 87 Ind. 383.

He would have no standing, however, in a suit to recover the land, or quiet his title, if he had taken no steps to obtain a sheriff's deed.

When the appellants attempted to redeem, they had the right to redeem in either character, and under either section of the statute. As holders of the sheriff's certificate, they were entitled to redeem as lien-holders. If, however, they wished to redeem as holders of a title, they could do so by first demanding of the sheriff a deed on their certificate. If he complied with their request, and executed the deed, they could redeem as the holders of a legal title. If he refused, they could show that fact, and redeem as holders of an equitable title. Having elected to redeem as lien-holders, they could only do so by complying with the requirements of section 772 *supra*. This they did not do.

Petition for rehearing overruled.

Filed Jan. 13, 1892.

DISSENTING OPINION.

OLDS, J.—I do not concur in the theory that both the legal and equitable title continues in the judgment debtor after the expiration of the year for redemption, and until the deed is issued or a demand made for a deed. I believe when the year for redemption expires the equitable title vests in the owner of the certificate of purchase, and after that time, and before deed issues, he has a right to redeem as an equitable owner. I do not think the authorities cited in the opinion overruling the petition for rehearing support the conclusion reached. The case of *Taggart v. McKinsey*, 85 Ind. 392, is not antagonistic to my views. If the holder of the certificate permitted a redemption after the expiration of the year and before deed issued, and accepted the money, it would divest him of his equitable title, or at least estop him from taking out a deed and recovering the real estate, and no re-conveyance would be necessary. The case of *Neff v. Hagaman*, 78 Ind. 57, is not in conflict with my views. I admit that during the year for redemption title does not pass. While it remains but a lien, and the judgment debtor is the owner, he has the right to redeem, but at the expiration of the year it becomes more than a lien—the holder of the certificate becomes the equitable owner, and the judgment debtor has no right to redeem. The legal title passes when the deed is executed.

In my opinion a rehearing ought to be granted.

Filed Jan. 13, 1892.

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No. 14,697.

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THE CEREALINE MANUFACTURING COMPANY v. BICK-
FORD ET AL.

CONTINUANCE.—Judicial Discretion.—Reversal of Judgment.—While granting or refusing a continuance on account of an absent witness is a legal question, it necessarily involves much of judicial discretion, and the Supreme Court will reverse only where it appears that such discretion has been abused to the injury of the complaining party.

From the Bartholomew Circuit Court.

S. Stansifer and *C. S. Baker*, for appellant.

J. C. Orr, for appellees.

MILLER, J.—The appellees sued the appellant on account. Answer that the goods were warranted, and that there had been a breach of the warranty; also a paragraph of counterclaim was filed by the appellant against the appellees, counting upon the breach of warranty, and asking an affirmative judgment for a large sum.

The action was commenced August 23d, 1887, and, having been regularly set for trial at the May term, 1888, was continued, on affidavit and motion filed by the appellant, on account of the absence of Joseph F. Gent. On the 1st day of October, 1888, the appellant applied for a second continuance on the account of the continued absence of Gent, and in support of the motion filed the affidavit of Richard Thomas, which is, in substance, as follows:

That the affiant is the secretary of the defendant company, and, in the absence of Joseph F. Gent, vice-president and secretary, is its acting superintendent; that the defendant can not safely go to trial without Gent. After showing that Gent was a competent and material witness, whose presence both as a witness and as a party having exclusive knowledge of the facts of the defence was absolutely necessary to a proper defence, it states the reasons for his absence, and efforts to procure his attendance, in the following language:

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" When said case was set down for trial at the last term of this court, defendant caused a summons to be issued for and served upon said Gent as a witness for defendant, and it was his purpose to put defendant's attorneys in advance of the trial in possession of the details of the defence, and to be at the trial for the purpose before indicated, but he did not so advise said attorneys, as affiant is informed by them, or any one else connected with the defendant company, and he was absent, and the case was continued on account thereof. His then failure in respect to the attorneys, and his then and continued absence, were and are because of the facts following: Owing to serious impairment of his health, disease of his heart, said Gent, shortly before the time set for trial at the last term, was ordered by his physician, Dr. Hammond, of New York city, where said Gent frequently was on business of defendant company, and for treatment, to go to Carlsbad, a health resort in Bohemia, for treatment, as soon as he could reasonably leave, and said Gent directed the agent of defendant company to procure passage on a steamer for Europe leaving after said day set for trial, but a few days before said time said agent telegraphed said Gent that, owing to the throng of outgoing passengers, passage could not be engaged earlier than in September of this year, but that he had purchased from a passenger on a steamer to leave on the 2d day of June, 1888, his fare-ticket and berth, and he left Columbus on 27th day of May, 1888, and took passage on said steamer, intending, and as defendant believed he would, to return by the first of September, 1888. When said telegram was received and his purpose to leave made known to defendant, there was not time to give notice and take his deposition, even if such deposition would have answered the purpose of the defence, which it would not, for reasons before stated, and, hurried as he was in making preparations to leave, he had not time or opportunity to put defendant's attorneys, or other person, in possession of the data, in detail, of the defendant's side of the case. Said Gent remained

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at Carlsbad until he went, under the direction of his physician there, to Ragutz, a health resort in Switzerland, and under like orders from there he went under like advice to Weisbaden, in Germany, and the last heard from him by letter was of date September 11th, 1888, from Elberfeld, in Prussia, in which he wrote that his health was fully restored, and that he expected to start home very soon. In the letter he stated that he would telegraph when he started. On the 25th day of September, 1888, affiant received a cablegram from said Gent at Bremen, Germany, saying that he would sail for home on the 29th of September, 1888. Affiant says that he is thoroughly satisfied and believes truly that said Gent has not absented himself on account of this case, but was actuated solely by health consideration; affiant expects and fully believes that said Gent will arrive home before the next term of this court, and that he will be able to and will take charge of and conduct said case and be present at the trial to aid, assist and testify."

In addition to this affidavit, that of defendant's attorneys was filed, in which it is stated, that, "In so far as it relates to the failure of Gent to impart to them the details of the defence it is true; and, further, they say that, from their knowledge of said Gent as an expert machinist, and from their general knowledge of the case, the presence, aid and assistance of said Gent, as well as his testimony, is absolutely necessary for a proper presentation of defendant's side of the case."

The motion for a continuance was overruled and excepted to, the cause tried and a judgment for the full amount of the plaintiff's claim rendered. The action of the court in refusing to continue the cause is the only question in the record.

The appellant contends that a showing was made by these affidavits entitling the appellant to a continuance, upon either of the following grounds:

First. Treating Gent as a mere witness, for the reason

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that he was not at any time after his departure, before the first continuance, within the jurisdiction of the court; and that the facts set forth in the affidavits show that further diligence was impractical.

Second. Treating Gent not only as an ordinary witness, but also as possessed of peculiar knowledge, information and technical skill, which rendered his personal presence, aid and assistance at the trial absolutely necessary, it was an abuse of discretion to refuse a continuance.

Third. That the presence of Gent was of more importance at the trial of the cause than is that of a party ordinarily, and that, therefore, his sickness entitled the defendant to a continuance.

The affidavit makes a sufficient showing of the importance to the defendant of the presence of Gent as a witness, and also as an officer of the corporation having peculiar knowledge of the defence, to have entitled it to a continuance, if sufficient diligence is shown to obtain his presence, or in lieu thereof, his evidence and advice as to the conduct and management of the trial.

The record discloses the fact that the suit was commenced August 23d, 1887. We may presume that the absent witness, who was the vice-president and superintendent, as well as the skilled mechanic of the company, was present during the year which elapsed before his departure for Europe. The record informs us that during this time the issues in the case were made up and thus attention called to the nature of the proposed defence. No excuse is given for the failure of this superior officer of the corporation, during this long period of time, to properly advise the defendant's attorneys of the facts within his knowledge. The company is chargeable with the consequences of his negligence. His negligence is also that of the company. The fact that Gent was the vice-president and superintendent of the company, and that the company is chargeable with his neglect and omissions, must be taken into consideration in every aspect of the case,

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whether we consider him as a mere witness, as an expert, or as standing for the company as the adviser of its attorneys. When viewed in this light, we think it appears that the court did not err in refusing to grant a second continuance of the cause.

It does not appear that any effort was made by Gent to return from Europe in time to be present at the trial of the cause. It appears from the affidavit that his health was fully restored on September 11th, 1888; how long prior to that does not appear, and the omission is to be construed against the appellant. Assuming, however, that it was only restored at that date, he might, so far as is shown in the affidavit, have returned by the ordinary modes of travel in time to have been present at the trial. His failure to start home when fully restored to health is neither explained nor excused.

The fact that the trial of the cause had been once continued on account of his absence, and that the time was approaching for another trial, should have been an incentive to diligence. And the fact that this was a second application for a continuance on account of the absence of the same witness was a circumstance to be considered by the court in ruling upon this question. *Breedlove v. Bundy*, 96 Ind. 319; *Peck v. Parchen*, 52 Iowa, 46.

Had the court granted a continuance we would not, probably, have reversed its decision. While granting or refusing a continuance on account of an absent witness is a legal question, yet it has been said that it "necessarily involves much of judicial discretion." *Boone v. Mitchell*, 33 Iowa, 45. And we can only reverse where it appears that such discretion has been abused to the injury of the complaining party.

Judgment affirmed.

Filed Sept. 22, 1891.

First Nat'l Bank of Martinsville *et al.* v. Connecticut Mutual Life Ins. Co.

No. 16,186.

THE FIRST NATIONAL BANK OF MARTINSVILLE ET AL. v.
THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

MORTGAGE.—Priority of Lien.—Pre-Existing Debt.—Knowledge of Earlier Mortgage.—Evidence—A mortgage was executed to the plaintiff, on the 27th day of June, 1884, to secure a loan then made to the mortgagors, and the mortgage was recorded on the 28th day of January, 1885. The same parties executed a mortgage on the same real estate on the 22d day of November, 1884, to a bank, which latter mortgage was recorded on the 25th day of November, 1884.

Held, that if the mortgage to the bank was executed to secure a pre-existing debt, without any extension of the time of payment, as a consideration for the mortgage, the plaintiff's mortgage would constitute a prior lien on the property.

Held, also, that if the bank, as it was claimed, and as there was some evidence to show, had knowledge of the existence of the plaintiff's mortgage at the time of the execution of its own mortgage, then, notwithstanding the fact that the mortgage to the bank may have been given for value, the plaintiff's mortgage would have priority.

Held, also, that the mortgage to the bank having been excluded when offered in evidence, and this ruling not being brought before the Supreme Court for review, the bank, under the evidence in the case, could not in any event have its mortgage declared a prior lien.

From the Johnson Circuit Court.

G. M. Overstreet, A. B. Hunter, W. R. Harrison, A. M. Cunning and J. S. Newby, for appellants.

C. E. Barrett, W. Mills, S. J. Peelle and W. L. Taylor, for appellee.

OLDS, J.—The Connecticut Mutual Life Insurance Company brought this action to foreclose a mortgage executed to it by David Fogleman and Margaret Fogleman, his wife, on one hundred and thirty acres of land situate in Morgan county, Indiana, to secure the payment of \$2,500, making defendants said Fogleman and Fogleman and Isabel Hensley, who held a mortgage on 40 acres of other land owned by Fogleman, and the First National Bank of Martinsville, In-

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diana, who held a mortgage on the whole 170 acres of land owned by Fogleman, securing the payment of their bills of exchange amounting to \$3,150.

Hensley and the First National Bank of Martinsville filed answers and cross-complaints setting up their respective mortgages.

It appears that the mortgage was executed to the appellee, the insurance company, on the 27th day of June, 1884, and recorded in the recorder's office of Morgan county on the 28th day of January, 1885. The mortgage to the appellant, the First National Bank of Martinsville, was executed on the 22d day of November, 1884, and recorded on the 25th day of November, 1884.

The controversy arising in the case relates to the priority of the mortgages executed to the insurance company and to the bank.

It is contended on behalf of the bank that it holds a *bona fide* mortgage for value without notice of the existence of the mortgage to the insurance company; while the insurance company contends that the mortgage was given to the bank to secure a pre-existing debt, without any new consideration, not even an extension of time as a consideration for the mortgage, and that the bank had knowledge of the mortgage to the appellee, the insurance company, at the time of the execution of the mortgage to the bank.

The circuit court found in favor of the appellee, and that the mortgage in favor of the appellee was a prior lien to that of the bank.

Some question is made by the appellee in regard to the proper parties being before the court, or there being any assignment of error presenting any question.

The bank makes a separate assignment of error. Conceding the proper parties to be before the court, if any question is presented by such assignment of error, it is the overruling of the bank's motion for a new trial.

The bank offered in evidence the mortgage in its favor, to

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which the appellee objected, and the court sustained the objection, and excluded the evidence as against the appellee, but admitted it against the other parties, but no question is presented in regard to this ruling. The only question presented by the motion for a new trial relates to the sufficiency of the evidence to sustain the verdict.

It is admitted that the president of the bank, who acted for the bank in the transaction of the business, had full knowledge that there had been a mortgage executed by Fogleman's grantor, one McKinney, to the Northwestern Mutual Life Insurance Company for \$2,500, which Fogleman was to pay, and it is not questioned but that the mortgage given to the appellee was given for money loaned by it to Fogleman, which was used in paying off the other mortgage.

If there is any evidence to prove that the bank, or its president, who transacted the business, knew of the existence of the appellee's mortgage at the time the bank's mortgage was executed, then the finding of the court is sustained, and the judgment can not be reversed notwithstanding the mortgage to the bank may have been given for value.

It is our opinion that there is some evidence to support such a finding. Fogleman testifies that he thinks he told Mr. Satterwhite, the president of the bank, of the existence of the appellee's mortgage at the time the mortgage was drawn up and given to him by Mr. Satterwhite to take home to be executed by himself and wife, and to be then mailed to the bank.

This, together with the other facts, while not preponderating in favor of such a finding, yet tends to support it, and will sustain such a finding when made by the court, as this court will not weigh the evidence.

The evidence further tends to show that the mortgage was given to the bank to secure a pre-existing debt, and that there was not even an extension of the time of payment on account

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of and as a consideration for the mortgage. *Busenbarke v. Ramey*, 53 Ind. 499; *Wert v. Naylor*, 93 Ind. 431.

If the mortgage was executed simply as security for a pre-existing debt—that is as security for the payment of the bills of exchange, without any extension of the time of payment—the bank was not entitled to have its mortgage declared a prior lien to the mortgage of the appellee.

It was contended by the bank that the bills of exchange should be kept alive and times of payment extended, but the evidence tended to show that a consideration for such extension was payment of interest in advance, and not the execution of the mortgage.

Furthermore, in view of the ruling of the court, as between the bank and the appellee, the mortgage given to the bank was not in evidence, and hence the bank was not entitled, under the evidence in the case, to have its mortgage declared a prior lien, and foreclosed against the appellee, for as against the appellee such mortgage was not in evidence, it having been excluded by the ruling of the court when offered in evidence, and this ruling is not brought before this court for review.

There is no error in the record for which the judgment can be reversed.

Judgment affirmed, with costs.

Filed Oct. 8, 1891.

129 244
138 146

No. 15,187.

HIGBEE v. RODEMAN.

PRACTICE.—*Supreme Court.*—*Parties to Appeal.*—*Motion to Dismiss Appeal.*—*Waiver.*—Where a cause, pending in the Supreme Court, has been submitted by agreement of parties, all question as to the parties to the appeal is waived, and a motion filed thereafter to dismiss the appeal for want of notice to some of the parties to the judgment must be overruled.

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DEED.—*Condition Subsequent.*—*Right of Entry.*—A certain piece of land was conveyed by warranty deed to a township for common school purposes, and on the same day the grantors conveyed to the appellant a tract of land of which the land conveyed to the township was a part. The deed to the appellant excepted the lot conveyed to the township, and stated that the "lot was donated for school purposes so long as it shall be used for such purpose." The lot was used for school purposes for thirty years, and was then conveyed by the township trustee to the appellee for value, who has expended a large sum in the improvement of the property.

Held, that the language in the deed to the township does not tend to create a condition subsequent.

Held, also, that if the deed to the township contained a condition subsequent, and the deed to the appellant contained no exception, the property would revert, upon condition broken, to the grantor or his heirs, and that they alone would have the right of entry or re-entry.

Held, also, that if the conveyance to the township was upon a condition subsequent, the use of the property for thirty years for school purposes, would be a substantial compliance with the condition.

From the Hamilton Circuit Court.

T. J. Kane and *T. P. Davis*, for appellant.

R. R. Stephenson and *W. R. Fertig*, for appellee.

MILLER, J.—The motion made to dismiss the appeal for want of notice to some of the parties to the judgment is overruled. The cause having been submitted by agreement of parties long prior to the filing of the motion, all question as to the parties to the appeal is waived. *First National Bank v. Essex*, 84 Ind. 144; *Truman v. Scott*, 72 Ind. 258; *People's Savings Bank v. Finney*, 63 Ind. 460; *Ridenour v. Beekman*, 68 Ind. 236.

This was an action brought by the appellee against the appellant to quiet the title to a tract of land.

The ruling of the court in overruling the appellant's motion for a new trial is assigned as error here.

The only cause for which a new trial was asked was the insufficiency of the evidence to sustain the finding.

The evidence is substantially as follows: On and prior to March 13, 1865, Jeremiah Dunn was, the owner of the real

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estate in controversy, together with other lands adjoining. On that day Dunn conveyed to Adams township, in Hamilton county, the land in dispute, which consisted of one-half acre, by deed, the granting part of which is as follows:

"This indenture witnesseth: That Hannah Dunn and Jeremiah Dunn, of Hamilton county, and State of Indiana, convey and warrant to Adams township, *for common school purposes*, in said township of Hamilton county, in the State of Indiana, for the sum of five dollars, the following real estate in Hamilton county, in the State of Indiana, to wit."

On the same day Dunn conveyed to the appellant, Higbee, forty acres of land by a deed which contains one exception, which covers the land in dispute, and is as follows: "Except a lot of one-half ($\frac{1}{2}$) an acre off the northeast corner of said tract for school purposes, on which the district school-house now stands; which lot was donated for school purposes so long as it shall be used for such purposes."

The evidence shows, without dispute, that a deed was found among the papers in the trustee's office of the township some time in 1858 or 1859, to the township for this school lot; but that it was lost, and no evidence was given of its terms and conditions. The parties have agreed that the property was used for school purposes from 1855 until 1885. It is reasonable to suppose that it was held under the lost deed above referred to.

On the 4th day of October, 1886, Henry Devaney, "as trustee of Adams township, of Hamilton county," sold and conveyed the lot to the appellee for the consideration of four hundred dollars, which was a fair price for the property. The purchaser having paid for the property took possession, and has expended upwards of five hundred dollars in its improvement, and has, since his purchase, used the property for dwelling, and business purposes.

There was some evidence introduced, on the part of the appellee, intended to establish an estoppel, but we think it wholly insufficient for that purpose.

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In our opinion the court did not err in overruling the motion for a new trial. Conditions subsequent are not favored in law, but are strictly construed.

The language used in the deed from Dunn to the township specifies the use to which the property would be put, but does not even tend to create a condition subsequent. *Heaston v. Board, etc.*, 20 Ind. 398; *Schipper v. St. Palais*, 37 Ind. 505; *Sumner v. Darnell*, 128 Ind. 38.

Another bar to the recovery of the land by the appellant is that the deed from Dunn, under which he claims title, expressly excepts the lot in controversy from its operation. Any other construction deprives the exception of meaning.

If the deed to the township contained a condition subsequent, which it does not, and the deed from Dunn to the appellant no exception, the property would revert, upon condition broken, to the grantor or his heirs. The right of entry, or re-entry, can not be granted over, and none but the grantor, or his heirs, can take advantage of them. *Paul v. Connersville, etc.*, *R. R. Co.*, 51 Ind. 527, and cases cited.

If the conveyance from Dunn to the township was upon a condition subsequent, the township having had the use of the property, for school purposes, from 1855 to 1885, a period of thirty years, there has been a substantial compliance with the condition. *Sumner v. Darnell, supra*; *Hunt v. Beeson*, 18 Ind. 380; *Jeffersonville, etc.*, *R. R. v. Barbour*, 89 Ind. 375.

We find no error in the record, and the judgment is affirmed.

Filed Sept. 25, 1891.

Simons *et al.* v. Simons, Trustee.

No. 15,747.

SIMONS ET AL. v. SIMONS, TRUSTEE.

APPEAL.—Time of Filing Transcript.—Under the act of April 11th, 1885 (Acts 1885, p. 194, Elliott's Supp., section 417), providing that the appeal bond, in cases governed thereby, shall be filed within ten days after the decision complained of is made, and that the transcript shall be filed in the Supreme Court within thirty days after filing the bond, forty days are given within which to perfect appeals, and the fact that the appellant files his bond within the ten days will not limit the time for filing the transcript.

From the Allen Circuit Court.

A. Zollars, for appellants.

W. J. Vesey and O. N. Heaton, the appellee.

McBRIDE, J.—The appellee moves to dismiss the appeal in this case on two grounds :

1st. That the appeal was not taken in time.

2d. That no brief was filed within sixty days from the date of submission.

The position of the appellee is that the appeal is governed by sections 2454 and 2455, R. S. 1881, and section 417, Elliott's Supplement, and the appeal bond having been filed July 7th, 1890, while the transcript was not filed in this court until the 7th day of August, 1890, it was filed one day too late.

The appellant contends that the appeal is not governed by the sections of the statute in question.

It is not necessary for us to consider this phase of the controversy. The judgment appealed from was rendered June 28th, 1890. Section 417, *supra*, provides that the appeal bond, in cases governed thereby, shall be filed "within ten days after the decision complained of is made, unless, for good cause shown, the court to which the appeal is prayed shall direct such appeal to be granted on the filing of such bond within one year after such decision. * * * The trans-

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cript shall be filed in the Supreme Court within thirty days after filing the bond."

This section is an amendment to section 2455, *supra*, the only change being that section 2455, as originally enacted, required that the transcript be filed within *ten* days after filing the bond. That section has been several times construed by this court as allowing twenty days within which to perfect the appeal. *Yearley v. Sharp*, 96 Ind. 469; *McCurdy v. Love*, 97 Ind. 62; *Browning v. McCracken*, 97 Ind. 279; *Miller v. Carmichael*, 98 Ind. 236.

Applying the same rule to section 417 will allow forty days within which to perfect appeals—ten days within which to file the bond and thirty days thereafter within which to file the transcript in this court. The fact that the appellant files his bond within the ten days will not limit the time for filing the transcript. The law gives the same time to both parties to appeal. An administrator or executor is not required to file a bond, yet he may take the full forty days for perfecting an appeal, and the opposite party is entitled to the same time.

The law is intended to be equal in its operation, and to apply alike to the parties on both sides of the controversy. If the administrator or executor, who files no bond, may perfect his appeal at any time within forty days (about which there seems to be no doubt), there is no good reason why the opposite party should not have the same right. The appeal was therefore perfected in time.

The controversy is over a report filed by a trustee—the appellants having filed exceptions to it. The brief filed contains a statement of certain facts alleged to be shown by the report, together with something by way of argument, claiming to show an abuse of the trust and mismanagement of the trust property.

While not such an argument as should be addressed to the court in a case of so much apparent importance, it can not be said that it is not a brief, and at least a partial compliance

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with the rule. Illness of counsel is shown as an excuse for not filing a more elaborate brief.

Motion to dismiss overruled.

Filed Oct. 14, 1891.

No. 15,072.

SCOTT ET AL. v. MICHAEL ET AL.

DEED.—How Construed.—Exception in Favor of Grantee.—Doubtful Language.

—Where the language of a deed will admit of two constructions, the one less favorable to the grantor is to be adopted. An exception in a deed is to be taken most favorable for the grantee. If the language of a conveyance is doubtful, it must be construed so as to ascertain, if possible, the intention of the parties.

SAME.—What Passes Under it.—In a conveyance of property, everything essential to the enjoyment of the property is to be considered, in the absence of language indicating a different intention on the part of the grantor, as passing with it, either as a parcel thereof or appurtenant thereto.

SAME.—Mil. Property.—Conveyance of.—What it Includes.—Maintenance of Dam.—The conveyance of mill property carries with it, whether the word "appurtenances" be used or not, all the incidents and privileges connected with its use, and this includes the right to maintain a dam, so as to produce a head, or power, equal to that which existed at the time the conveyance was executed.

SAME.—Right to Maintain Dam.—Deprivation of Right.—Compensation for Loss.—The right to maintain a dam at the height it exists at the time of a conveyance of mill property, is of itself property, and a part of the thing sold, and the covenants of the deed extend to and cover the right to maintain the dam at such height, as an incident of the estate and necessary to its enjoyment, and if the grantee is deprived of such right because the grantor had not the right to maintain it at the height covenanted, he is entitled to compensation for such loss.

SAME.—Right of Flowage.—Reference to Mortgage.—Effect of.—Where a deed purported to convey certain mill property, with all its privileges and appurtenances, and then referred to a certain mortgage in which the right of flowage was greatly restricted, the provision in the mortgage can not be regarded as placing a limitation upon the rights and privileges granted. It would require clear and explicit words of limitation

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to cut down the express and implied grant of the right of flowage as it existed at the date of the execution of the conveyance.

SAME.—Direct Language and Words of Recital.—Repugnance Between.—How Construed.—As between terms directly given as the language of the grantor, and words incorporated by way of recital, from another instrument, in case of repugnance, that which is recited must be rejected, and that which is direct adhered to, as being most likely to express the intention of the parties.

From the Elkhart Circuit Court.

J. H. Baker and F. E. Baker, for appellants.

H. C. Dodge and E. G. Herr, for appellees.

MILLER, J.—A complaint in two paragraphs was filed by the appellants against the appellees. The first paragraph seeks to procure the cancellation of a mortgage given by the plaintiffs to secure part of the purchase-price of a mill and appurtenances, on account of a breach of warranty contained in the deed by which the premises were conveyed to the plaintiffs. This deed is made an exhibit, and, omitting the signatures and acknowledgment, is as follows:

“This Indenture Witnesseth: That Enos Michael and Barbara Michael, his wife, of Branch county, in the State of Michigan, convey and warrant to John Anderson of Steuben county and State of Indiana, and Edward G. Scott of Branch county, Michigan, the interest of the said John Anderson to be the undivided one-third, and the interest of the said Edward G. Scott to be the undivided two-thirds of the real estate hereinafter described, for the sum of eight thousand dollars, the following real estate in Elkhart county, in the State of Indiana, to wit: That which is now known as the Benton Centennial Mills, on the Elkhart river, near the town of Benton, together with all privileges, water-powers, flowage and appurtenances of every kind whatsoever thereunto belonging, as the same is recorded in a certain mortgage dated May 12th, 1877, executed by Joseph Harris and James G. Ackerman to Samuel Stetler, and recorded in the mortgage record 20, page 280, in the recorder’s office of

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Elkhart county, Indiana, as follows: "All lands in section seven (7) and eight (8), in township thirty-five (35) north, of range seven (7) east, which Peter Darr owned in his lifetime, and a small fraction of land lying near the saw mill south of the river and north of the Fort Wayne road, which comprises all of the land north of the road from the west line of said land to a point where the Fort Wayne road touches the Elkhart river, with the privilege of overflowing so much of the land necessary in which the said Stetlers have any interest and claim; also the west half ($\frac{1}{2}$) of lot numbered nineteen (19) in Boyd's addition to the town of Benton, together with the mills and all the privileges and easements thereto belonging, subject to all taxes that are and may become a lien and come due after January, 1880."

The paragraph avers that at the time the property was sold, and deed executed, the dams and embankments for storing the water by which the mills were propelled were maintained at the height of six feet, and that without their maintenance at that height the mills could not be operated with success and profit, but were worthless; that after the execution of the deed a suit was commenced against the plaintiffs and Anderson, charging that at and prior to the date of said deed the dams and embankments were higher by two feet than the owners of the mill had a right to erect and maintain them; that the grantor in the conveyance to them was notified and defended the action; but that a judgment for damages and costs was rendered against the plaintiff and Anderson, and also a decree for the reduction of the dam to the height of three feet, and that pursuant to the decree the sheriff of the county has cut them down to that height. See *Anderson v. Hubble*, 93 Ind. 570.

The defendants successfully demurred to this paragraph, and the ruling of the court is assigned as error.

The second paragraph of complaint alleged title in the plaintiff for two-thirds of the same property, and asked to have his title to the same quieted and set at rest.

The defendants, Forney & Forney, who had become the owners of the unpaid notes and mortgage in controversy, filed a cross-complaint seeking to foreclose their mortgage.

A demurrer was overruled to the cross-complaint, and this ruling is assigned as error.

The appellants answered the cross-complaint, pleading substantially the same facts that had been set up in the first paragraph of his complaint, and a demurrer was filed and sustained to this pleading.

No objection to the sufficiency of the cross-complaint has been pointed out, and that assignment of error may be treated as having been waived.

The rulings of the court in sustaining the demurrers to the first paragraph of the amended complaint and to the answer to the cross-complaint present the same questions, and may be discussed together.

The contention of the appellants is that the deed conveyed, as an incident to the grant, the dam as it stood at the date of the deed, and that the covenants in the deed assumed to protect him in the quiet enjoyment of the grant.

The contention of the appellees, on the other hand, is, that the deed limits the conveyance and covenants for the overflow of land to "so much of the land necessary in which the said Stetlers have any interest and claim;" and that, therefore, the paragraphs of complaint and answer under consideration are bad for want of an averment that the lands overflowed, which gave the right of action on account of which the dam was lowered, were lands "in which the said Stetlers had an interest."

It is well settled law that when the language of a deed will admit of two constructions the one less favorable to the grantor is to be adopted; not that the words are to be twisted out of their proper meanings, but that where, after other efforts have failed to show which of the expressions show the meaning of the parties, the one most disadvan-

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tageous to the person who used them is to be adopted. 2 Dev. Deeds, section 848.

An exception in a deed is to be taken most favorable for the grantee; and if it be not set down and described with certainty, the grantee shall have the benefit of the defect. *Jackson v. Myers*, 3 Johns. 388.

If the language of a conveyance is doubtful, it must be construed so as to ascertain, if possible, the intention of the parties: "In trying to ascertain that intention, it is the duty of a court to assume, as nearly as possible, the position of the contracting parties, and to question the circumstances of the transaction between them, and then to read and interpret the words which they used in the light of those circumstances." *Truett v. Adams*, 66 Cal. 218.

In conveyances of property everything essential to the enjoyment of the property granted is to be considered, in the absence of language indicating a different intention on the part of the grantor, as passing with it, either as a parcel thereof or appurtenant thereto. *Sparks v. Hess*, 15 Cal. 186.

The conveyance of mill property carries with it all the incidents and privileges connected with its use, and this includes the right to maintain a dam, so as to produce a head or power equal to that which existed at the time the conveyance was executed. *Lammott v. Ewers*, 106 Ind. 310; *Scott v. Stetler*, 128 Ind. 385.

The right to maintain a dam at the height it exists at the time of a conveyance of mill property, is of itself property, and a part of the thing sold, and the covenants of the deed extend to and cover the right to maintain the dam at such height, as an incident of the estate and necessary to its enjoyment, and, if the grantee is deprived of such right because the grantor had not the right to maintain it at the height covenanted, he is entitled to compensation for such loss. *Scheible v. Slagle*, 89 Ind. 323; *Adams v. Conover*, 87 N. Y. 422; *Bowling v. Burton*, 101 N. C. 176; *Strickler v.*

Todd, 10 Serg. & Rawle, 63; *Maddox v. Goddard*, 15 Me. 218 (33 Am. Dec. 604); Angell Watercourses, section 153a.

The word "appurtenances" need not be used in a conveyance of mill property, for without added words the deed of the mill, however described, will include the site, dam, water privileges and all other things essential to the beneficial enjoyment of the mills as an incident of the grant. 2 Dev. Deeds, section 863; Angell Watercourses, *supra*; *Tabor v. Bradley*, 18 N. Y. 109; *United States v. Appleton*, 1 Sum. 492.

The deed under consideration is inartistically drawn, and the confusion, apparent from a mere reading of the instrument, probably arises from the attempt of the draughtsman to incorporate the description of the premises contained in a mortgage. At first the deed purports to convey by words of general description what is known as the "Benton Centennial Mills," with all its privileges and appurtenances of every kind; and then for a further description refers to the mortgage, in which the supposed limitation of the right of flowage to the Stetler land is contained. The concluding clause again contains words amply sufficient to convey all the mills, privileges and easements, either on the lot in the town, or the whole property described in the deed.

The proper construction to be put upon the instrument is not free from difficulty, but we have arrived at the conclusion that, taking the deed as a whole, it was not intended to and does not limit the right of flowage to the lands on which the Stetlers had an interest. The words purport, on their face, to be a grant, and not a limitation, and it is only by the doctrine of exclusion that they can be so construed. In the face of the full and repeated words granting not only the mills, but the easements and appurtenances, we can not believe that the parties intended by the use of these words, apparently copied from the mortgages, to put a limitation upon the right and privileges granted.

The maintenance of the dam at the full height of six feet,

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according to the allegations of the pleadings, was absolutely essential to the beneficial enjoyment of the mills ; it was a part, and an important part, of the property which he purchased, and entered largely into its value. It must have appeared to the purchaser at the time he bought the property that his grantor had the right of flowage to the extent and in the measure then existing, and necessary to carry on the business for which the mill had been erected, and was used. Under these circumstances it seems to us that it would require clear and explicit words of limitation to cut down the express and implied grant of the right of flowage as it then existed.

This instrument may, we think, be viewed from another standpoint ; that is, after granting the mills and appurtenances, by terms of general description, reference is made to the mortgage for a further description, the description from the mortgage purports to be set out *in hæc verba* ; no words or marks are used to indicate just where the parts copied from the mortgage terminate ; but we may infer that it includes all that part of the instrument that is descriptive of the premises conveyed, and ends with the word " Benton ;" and that the clause " together with the mills, and all privileges and easements thereunto belonging, subject to all taxes that are or may become a lien, and come due after January, 1890," are words of grant, applying not merely to the town lot, but to the whole premises conveyed. This view is strengthened by the fact that the language used is in entire harmony with that portion of the instrument that immediately precedes the reference to the mortgage.

As between terms directly given as the language of the grantor, and words incorporated by way of recital, from another instrument, we must, in case of repugnance, reject that which is recited, and adhere to that which is direct, as being most likely to express the intention of the parties, just as the written portion of a deed, or other contract, will prevail over that which is printed ; the presumption being

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that the draughtsman, in copying the description, improperly included terms and conditions applicable only to the mortgage. We are of the opinion that the court erred in sustaining the demurrer to the first paragraph of the amended complaint, and to the answer to the cross-complaint.

Judgment reversed, and cause remanded for further proceedings in accordance with this opinion.

Filed Oct. 6, 1891.

No. 15,273.

WRIGHT ET AL. v. CHARLEY.

WILL.—Construction.—Nature of Estate.—Where real estate is devised to one, coupled with a devise over, in case of his death without issue, and the primary devisee survives the testator, he takes an absolute fee, the words referring to a death meaning a death in the lifetime of the testator.

From the Harrison Circuit Court.

G. W. Denbo, N. R. Peckinpugh and H. C. Hays, for appellants.

W. Cook, W. Ridley, W. N. Tracewell and R. J. Tracewell, for appellee.

COFFEY, C. J.—This was an action brought by the appellants against the appellee in the Harrison Circuit Court for the partition of the land described in the complaint, and to quiet title to such land as against any claim thereto by the appellee. The material facts in the case, as set forth in the complaint, and admitted by the demurrer thereto, are that Eli Wright, in the year 1873, executed his last will and testament, by which he made disposition of all his property both real and personal. He died in April, 1874, and his will was admitted to probate in May thereafter. By the second clause

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in his will he devised to his oldest son, William M., certain property to be taken as his full share of the estate.

The third clause makes a like devise to his next oldest son, James H. Wright.

The fifth clause provides that the testator's five unmarried children, namely, Emma J., Rildy R., Addy, Samuel and Peter S., shall reside together on the home farm until Peter shall arrive at the age of twenty-one years.

The sixth clause provides for the sale of the personal property remaining on hand at the time Peter arrives at the age of twenty-one, and for a distribution of the proceeds.

The seventh and eighth clauses are as follows:

"Item Seventh. It is my will that all my real estate remaining, not devised to my son James H., be equally divided, in value, between my children, Emma J., Rildy R., Addy, Samuel and Peter S., said division to be made by my executors, if living, or if not living, the survivors, or by my administrator with the will annexed, as the case may be, with the assistance of one or two discreet persons, competent to make such partition; the preference of the homestead to be given to my son Samuel.

"Item Eighth. It is my will, and I hereby direct, that in case of the death of either of my children, except William M., and they leave no children, the property bequeathed to them by this my last will and testament be divided between my children, except William M., and division made in accordance with my desire in this will by my executors."

All the persons named in the will survived the testator. The land was divided by the executors pursuant to the terms of the will, and to perfect the partition the devisees executed deeds to each other. Rildy R. married the appellee, David Charley, and died intestate in the year 1888, without child or children. The appellants claim the land set off to her under the provisions of clauses seven and eight of the will of Eli Wright, while the appellee claims as the surviving husband and only heir of Rildy R., deceased.

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The respective claims of the parties depend upon the construction of these clauses in the will of Eli Wright; the appellants contending that the devisees therein named took a defeasible fee, while the appellee contends that they each took a fee absolute.

It is the well-settled doctrine that the courts of this country will so construe a will, when not inconsistent with the intention of the testator, as to prevent the title to real estate from remaining contingent; and, unless there are plain indications of a contrary intent, will consider the entire title as vested in those claiming under the will, rather than in abeyance. *Wills v. Wills* (Ky.), 3 S. W. Rep. 900; *Heilman v. Heilman*, ante, p. 59.

In accord with this rule, it is said by Mr. Jarman to be an established rule that where a bequest is simply to one person, and, in case of his death, to another, the primary devisee, surviving the testator, takes absolutely. This rule applies to both personal and real estate, and the authorities in this country uniformly sustain the construction that, in a devise or bequest *simpliciter* to one person, and, in case of his death, to another, the words refer to a death in the lifetime of the testator. 2 Jarman Wills, 752. This rule is fully sustained by the authorities. *Moore v. Lyons*, 25 Wend. 119; *Kelly v. Kelly*, 61 N. Y. 47; *Briggs v. Shaw*, 9 Allen, 516; *Whitney v. Whitney*, 45 N. H. 311; *Vanderzee v. Haswell* (N. Y.), 8 N. E. Rep. 247; *Reams v. Spann*, 26 S. C. 561; *Wills v. Wills*, *supra*; *Hoover v. Hoover*, 116 Ind. 498; *Harris v. Carpenter*, 109 Ind. 540.

So, too, another well established rule is that where real estate is devised in terms denoting an intention that the primary devisee shall take a fee on the death of the testator, coupled with a devise over, in case of his death without issue, the words refer to a death without issue during the lifetime of the testator, and that the primary devisee, surviving the testator, takes an absolute estate in fee simple. *Clayton v. Lowe*, 5 B. & A. 636; *Gee v. Mayor, etc.*, 17 A.

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& E. (N. S.) 735; *Woodburne v. Woodburne*, 19 L. J. (N. S.) Ch. 88; *Doe v. Sparrow*, 13 East, 359; *Quackenbos v. Kingsland*, 102 N. Y. 128; *Livingston v. Greene*, 52 N. Y. 118; *Embury v. Sheldon*, 68 N. Y. 227; *Mickley's Appeal*, 92 Pa. St. 514; *Heilman v. Heilman*, *supra*.

There is nothing in the will before us indicating that it was not the intention of the testator that the devisees therein named should not take a fee in the lands devised to them immediately upon his death; and guided by these well established rules of construction we are of the opinion that the words referring to the death of any of the devisees relate to a death occurring before the death of the testator.

Such being the case, the court did not err in sustaining a demurrer to the complaint in this cause.

Judgment affirmed.

Filed Oct. 14, 1891.

No. 14,998.

NALL, ADMINISTRATRIX, v. THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY.

MASTER AND SERVANT.—Fellow-Servants.—Whether in a given case one is acting as the representative of the master, or merely as a co-employee with others employed by the same master, depends upon the character of the duties imposed upon him and which he is performing at the time, and not upon his rank or title.

SAME.—Who are Fellow-Servants.—Where an employee of a railroad company, intrusted with the duty of saving a bridge whose destruction is threatened by a freshet, in pursuance of the authority conferred upon him, calls out the employees from the various departments of the railroad company's service to unite in saving the bridge, chooses the place where they should work, and directs what appliances they should use, he is not a fellow-servant with those under his control.

SAME.—Duty of Master.—The master's duty to his employees to provide safe places for them to work is a continuing one, and requires him to use ordinary care to keep them safe, and if they become unsafe through

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his neglect, or are made unsafe through his act, he must answer in damages to a servant who is injured thereby, who is himself free from contributory negligence.

SAME.—*Assumption of Risk of Employment.*—Where the master orders a servant to do something which involves encountering a risk not contemplated in his employment, although the risk is equally open to the observation of both, it does not necessarily follow that the servant either assumes the increased risk, or is negligent in obeying the order. If the apparent danger is such that a man of ordinary prudence would not take the risk, the servant acts at his peril; but unless the apparent danger is such as to deter a man of ordinary prudence from encountering it, the servant will not be compelled to abandon the service, or assume all additional risk, but may obey the order, using care in proportion to the risk apparently assumed.

From the Orange Circuit Court.

S. B. Voyles, for appellant.

E. C. Field, C. C. Matson, W. S. Kinnan, D. M. Alsbaugh
and *J. C. Lawler*, for appellee.

MCBRIDE, J.—The appellant is the widow and administratrix of one Waldo Nall, who was killed while in the service of the appellee.

She brings this suit to recover damages for his death, which she charges was caused by the actionable negligence of the appellee.

The deceased was a track-hand, or section-hand, who had been employed in railroad work only about two weeks when he was killed. A heavy freshet in Salt creek, Lawrence county, caused a large accumulation of drift-wood and other debris against one of appellee's bridges which spanned said creek, and endangered its safety to such an extent that it was deemed necessary to call out an extraordinary force of men on Sunday to save the bridge from destruction. The complaint alleges, in substance, that the appellee intrusted to one ——— Helms the sole and absolute supervision over and direction of the task of saving said bridge, and that, acting under the authority thus conferred, he called upon and required a large number of employees, belonging to

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various departments of appellee's service, to assist in said work, he alone directing and commanding how such work should be done and who should do it.

In addition to the averments of the complaint descriptive of the duties thus devolved upon Helms, and of the authority with which he was invested by the appellee, he is designated in the complaint as "agent and chief foreman of defendant," "defendant's agent and chief," etc.

It is also averred that the appellee is a corporation, with its principal offices and officers all beyond this State. Among the employees thus called out was the decedent, and it is alleged that he was killed while engaged in the prosecution of said work.

The facts relating to his death are stated in the complaint as follows :

"That said Nall, from lack of experience, and from the fact that said peril and danger were not apparent to him, was not apprised of the imminence of such peril and danger, all of which defendant was fully cognizant when said Nall was required to work at said drift-wood, logs and *debris*. Defendant, well knowing the perils and dangers incident to said work of removing said drift-wood, logs and *debris*, through and by its agent and chief aforesaid, charged, as above stated, with the accomplishment and prosecution of said work, wantonly and negligently required said Nall to go down off the railroad track into said stream, among said drift-wood, and engage with said other men so gathered together by said Helms (agent and chief), and while said work was in progress, under the supervision of said defendant's above-named agent and chief, charged by defendant as stated, the said Helms, as such representative of the defendant, carelessly and wantonly commanded and caused one of the locomotive engines of defendant to be suddenly started up and accelerated in speed, while plaintiff, decedent, was yet down among such drift-wood, and ropes thereunto attached, and in great peril of being struck by said ropes and appliances attached

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to said engine in said work of removing said drift-wood, logs and *debris*, and where he had been commanded to go as stated, and thereby one of such ropes was by said engine suddenly, carelessly and recklessly pulled, jerked and slipped from its place with great violence, and struck said plaintiff, decedent, and killed him instantly, all without fault and without any neglect on the part of plaintiff's decedent."

A demurrer was sustained to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and error assigned on this ruling presents the only question in the case.

Counsel for appellee state the grounds of objection to the complaint as follows:

"*First.* That the proximate cause of the death of the decedent was the negligence of the engineer and foreman in suddenly starting the engine, and that the engineer and foreman and decedent being co-employees, there can be no recovery.

"*Second.* If it be held that the proximate cause of decedent's death was the dangerous place at which he was directed to perform the service, then the risk and hazard of performing the service at the place was obvious to the decedent, and that in entering upon the performance of such work at such place he assumed all the risks incident thereto."

The sufficiency of the complaint in this case depends upon the *status* of the foreman, Helms. From the averments of the complaint, in what relation did he stand to the decedent and to the appellee? If he was merely a fellow-servant with appellee, it is clear that, under well established rules, the complaint did not state a good cause of action.

Counsel for appellant inveighs bitterly against the rule which exempts a master from liability for an injury suffered by an employee because of the negligence of a fellow-servant. So far as the rule is concerned, there is substantial unanimity among the courts of this country. It is uniformly regarded, within proper limits, as just, and in this opinion we heartily

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concur. While this is true, when it comes to the practical application of the rule the widest diversity of opinion is found to exist as to who are and who are not to be considered as fellow-servants. We are of the opinion that in some of the decided cases the courts have gone to an unwarranted extreme. While the errors thus committed may be to some extent corrected and the application of the rule limited, the rule itself is too firmly embedded in our jurisprudence to be dislodged, except by legislation. It is not the province of the courts to declare the law as they think it ought to be, but as it is.

Was the foreman, Helms, a fellow-servant of the decedent in such sense as to exempt the appellee from liability for his negligence?

This must be determined, not from the title given him, or from his rank in appellant's service, but from the character of the duties imposed upon him, and which he was performing when decedent was killed.

Bestowing upon him titles, or styling him in the complaint "agent," or "chief," or "representative of defendant," casts no light upon the matter. The law imposes certain duties upon a master, the performance of which he can not delegate to an agent so that he can escape responsibility. Whether the master assumes to discharge these duties in person, or intrusts them to another, he is in either case regarded as the actor.

The agent to whom he intrusts such duty, regardless of his rank, acts as the master, and in his place. *Indiana Car Co. v. Parker*, 100 Ind. 181, and authorities cited; *Atlas Engine Works v. Randall*, 100 Ind. 293; *Capper v. Louisville, etc., R. W. Co.*, 103 Ind. 305, and many other cases that might be cited.

Among the duties thus resting upon the master is that of using ordinary care to provide for his employees a safe place in which to work, and safe appliances with which to do the work required of them. Also to use ordinary care in the

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selection of his employees, and to neither knowingly employ nor retain in his service any whose habits, or lack of capacity or skill, will materially enhance the dangers of the service. A servant who is himself free from contributory negligence may recover damages of his master for any injury sustained by him by reason of the master's failure to properly acquit himself of any of these duties. When a master intrusts to a subordinate the duty of furnishing places and appliances for work, or the selection of employees, the negligence of such subordinate in relation thereto is his negligence, and he must respond.

Thus far the rule is not only well settled in this State, but there is general and substantial unanimity among the authorities everywhere. Outside of the limits thus indicated, the authorities are in irreconcilable conflict, and display the widest diversity of opinion. Thus, in one jurisdiction it is held that a section foreman on a railroad represents the master, and is not a fellow-servant with those under his control; while in others the opposite extreme is reached, and it is held that, in the case of corporations, all are fellow-servants, within the meaning of the rule, who are engaged in the common enterprise of carrying on the business of that corporation, regardless of their rank, from the humblest employee engaged in the most menial service to the general manager, or the president, except only when they are acting in discharge of the master's duty, in supplying a place to work, or appliances with which the work is to be done, and in the selection of employees.

In the case of *Columbus, etc., R. W. Co. v. Arnold*, 31 Ind. 174 (p. 184), the court not only carried the rule to the latter extreme, but far beyond, and used the following language: "The board of directors of a railroad company are its immediate representatives, and occupy the relation of master to the various employees engaged in operating the road and superintending and performing the business of the company in its various departments. When an injury results to a passen-

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ger on a train, or to a stranger, from the negligence or carelessness of an employee in the discharge of the duties devolving upon him, the principle of *respondeat superior* applies, and the company is responsible in damages; but this principle does not apply as between the company and its employees, and in such cases the company can only be held responsible to the employee where the injury is caused by the negligence or failure of the board of directors to perform some duty devolved upon them by express contract with the employee, or which is implied from the duties devolving upon them in their relation of master to the employee." In that case the negligence complained of was that of a master mechanic in charge of repair shops, and charged with the duty of keeping locomotives and other machinery in repair, who had negligently allowed a locomotive to get out of repair, and to be used in that condition, whereby the fireman, who was employed thereon, and who was himself without fault, was killed.

It was held that the corporation was not liable, on the ground that the negligence was that of a co-employee, for which the master was not liable.

As all of the courts, expressing such divergent views, assume to declare the common law, it is, of course, apparent that some of them have wrongly interpreted and applied the law.

The rule as laid down in *Columbus, etc., R. W. Co. v. Arnold, supra*, has been greatly modified in *Indiana Car Co. v. Parker, supra*, *Atlas Engine Works v. Randall, supra*, and in many other cases since decided, in so far as relates to the duty of the master to provide safe places and appliances for work, and his duty in selecting and in retaining servants in his service.

The recent case of *Taylor v. Evansville, etc., R. R. Co.*, 121 Ind. 124, may be said to mark another and very important modification of the doctrine of *Columbus, etc., R.*

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W. Co. v. Arnold, supra. In the opinion in that case the following language is used :

“Our judgment is that, at the time the appellant was injured, Torrence, the master mechanic, was performing the master's duty, and not merely the duty of a fellow-servant. He was in control of the shop where the appellant was working; he was the only representative of the master at that place; men, machinery and work were under his control. He gave the orders which it was the duty of those under him to obey, and he alone could give orders as the master's representative. He gave the specific order under which the appellant acted. He did not join the appellant as a fellow-servant in doing the work, but he commanded it to be done. He was in the position of one exercising authority, and not in that of one engaged in common with another in the same line of service. * * * It is not easy to conceive how it can be justly asserted that one who commands an act to be done, and who possesses the authority to command and enforce obedience from all servants employed in a distinct department by virtue of the power delegated to him by the master, is no more than a fellow-servant, for in the absence of the master, the command, if entitled to obedience, must be that of the master conveyed through the medium of an agent. Nor can it be held, without infringing the principles of natural justice, that if he who is authorized to give the command makes its execution unsafe, the employee, whose duty it is to obey, has no remedy for an injury received while doing what he was commanded to do.”

This is decisive of the case at bar. Applying this doctrine to the case before us, it is clear that the parties were not fellow-servants. To Helms was delegated absolute authority and control over the undertaking then in hand. He was authorized by the master to command the presence of the decedent, as of all the others engaged in the work, and

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to command where they should work and what they should do. He had all power which the master had to exact obedience to his commands.

The complaint alleges that while the decedent was in a certain place, doing a certain thing in obedience to the express order of Helms, the latter carelessly and wantonly commands another employee to start the locomotive engine in such way as to cause his death. Having required decedent to do a certain thing, while that thing is being done he carelessly, by another command, puts him in mortal peril and causes his death. If *Taylor v. Evansville, etc., R. R. Co., supra*, is well decided there is no room for controversy over the sufficiency of the facts pleaded in this case. Of course, the question here is on the pleading alone, the demurrer to the complaint admitting such facts as are well pleaded. The complaint is far from being a model pleading, but it states facts sufficient to constitute a cause of action, and the circuit court erred in sustaining the demurrer to it. It should be said, however, in justice to the court below, that the case of *Taylor v. Evansville, etc., R. R. Co., supra*, was not decided until after this case was decided in that court, and that his ruling was doubtless based upon what then seemed to be the weight of authority in this State.

Judgment reversed, with costs, with direction to the Orange Circuit Court to proceed in accordance with this opinion.

Filed June 19, 1891.

ON PETITION FOR A REHEARING.

MCBRIDE, J.—The appellee asks a rehearing upon the following grounds:

"1st. Because the complaint shows that the act which caused decedent's death was the act of a co-employee.

"2d. Because the dangers incident to the work which decedent was performing, were open and apparent to him, and he assumed the risk."

It is insisted that the court, in the original opinion, has

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failed to discriminate "between those duties which Helm performed as the act of the master, and those which he negligently performed as a servant."

As said in the original opinion, whether in a given case one is acting as the representative of the master, or merely as a co-employee with others employed by the same master, depends upon the character of the duties imposed upon him and which he is performing at the time, and not upon his rank or title.

One occupying a subordinate position may be authorized or required by the master to perform certain duties for which the master can not escape responsibility by delegating his authority, while one occupying the highest and most responsible position may, in a given case, be a mere co-employee.

Ordinarily the duties pertaining to a given employment are clearly defined. When one speaks of employment as a section-hand, a brakeman, or an engineer on a railroad, or as a farm-hand, or as a puddler in an iron furnace, or a moulder in a foundry, the general character of the duties such employee will be required to perform are at once understood by those initiated into the mysteries of the particular calling. As a rule, also, the mention of a given employment suggests the character of the appliances to be used, and the place and manner of using them. One who is placed in charge of a force of men engaged in any of those occupations, whose duties are limited to carrying on the work, or directing it, whether actively assisting therein or not, and who is invested with no authority, or charged with no duty in furnishing places or appliances for the work, or in the employment or retention of employees, is himself usually a mere co-employee. His duties require him to use, or superintend and direct the using of places and appliances, and to control employees furnished by the master. If, however, he is given additional authority, and is charged with the duty of furnishing places to work, and appliances for the work, and is au-

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thorized to employ and discharge operatives, he is, as to such things, not a co-employee, but speaks and acts as the master.

One who is placed in unrestricted control of a given department by his master, and is clothed with the power to command the services of the other employees, not simply to see that they faithfully discharge the duties ordinarily pertaining to their employment, and in the usual places, with the usual appliances provided therefor, but has authority to require of them the performance of other duties, in other places and with other appliances, who has the authority to call the section men, the bridge builders, the freight handlers and the laborers from the gravel pit and gravel train, and require of all that they unite in averting the threatened destruction of a bridge, is certainly in such matter more than a mere fellow-servant with those thus subject to his control. Indeed, counsel concede that Helms was a vice-principal, and represented the master in selecting the men, in procuring the machinery, and in choosing the place to work, but say :

"After he had chosen the men, the machinery and the place, his duties as vice-principal were complete. When he began to perform the work of taking out the drift wood, with all proper and suitable agencies provided, he was then a fellow-servant."

Counsel err in assuming that when Helms pointed out to the assembled employees the imperilled bridge and the accumulated drift and *debris* which threatened it, he had completed the work of selecting the place to work. As above stated, within their several departments, each man knows, or should know, in a general way at least, what duties are required of him, and how, when and where to use the appliances provided ; but at such a time and in such an emergency as that described in the complaint there must be an intelligent directing head to assign to the men their places, and direct them what to do ; to direct what appliances shall be

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used, and when, where and how they shall be used. This intelligent and directing head must be the master. And he to whom the master delegates such duty acts as the master, who can not escape responsibility by having another act in his stead.

Therefore, when Helms ordered the decedent to go down among the drift wood, and directed him what he should do there, he was still acting as vice-principal, and was furnishing to decedent his place to work. But, it is said, the dangers were open and apparent to him, and he assumed them.

It is true, that a servant impliedly assumes all the ordinary and usual risks incident to his employment, so far as those risks are known to him, or could be readily discerned by a person of his age and capacity in the exercise of ordinary care. But when the master orders a servant to do something which involves encountering a risk not contemplated in his employment, although the risk is equally open to the observation of both, it does not necessarily follow that the servant either assumes the increased risk, or is negligent in obeying the order. If the apparent danger is such that a man of ordinary prudence would not take the risk, the servant acts at his peril. But, unless the apparent danger is such as to deter a man of ordinary prudence from encountering it, the servant will not be compelled to abandon the service, or assume all additional risk, but may obey the order, using care in proportion to the risk apparently assumed. *Brazil Block Coal Co. v. Hoodlet*, *post*, p. 327, and authorities there cited.

It is, however, not necessary in this case to consider how far the decedent did, or did not, assume apparent risks when in obedience to the order of Helms he went down into the stream and among the drift wood. The master's duty to his employees to provide safe places for them to work is a continuing one, and requires him to use ordinary care to keep them safe, and if they become unsafe through his neglect, or are made unsafe through his act, he must answer in damages

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to a servant who is injured thereby, who is himself free from contributory negligence.

Even if it were conceded that in this case the decedent did assume the apparent risks, it would only include such risks as then existed or might reasonably be apprehended. He had a right to assume that the master would not do that which would enhance the danger or expose him to new and unsuspected perils.

When Helms assigned to decedent his place to work he represented the master. When he then turned to the engineer and gave the order which caused decedent's death, had he lost that character and become a mere fellow-servant? The law can not keep pace with such protean changes, and recognizes that act also as the act of the master creating a new danger which the decedent could not reasonably be expected to foresee, and which he therefore did not impliedly assume.

Since the original opinion was written our attention has been called to the case of *Dayharsh v. Hannibal, etc., R. R. Co.*, 103 Mo. 570, which is in principle in line with the conclusion we have reached in this case.

The petition for a rehearing is overruled.

Filed Oct. 13, 1891.

No. 15,228.

COURTNEY v. COURTNEY.

APPELLATE COURT.—*Money Demand.*—*Jurisdiction*—An appeal from a ruling sustaining a motion by attorneys for the vacation of an order of dismissal of plaintiffs' action, and for an allowance of fifty dollars for their fee, is within the jurisdiction of the Appellate Court.

From the Switzerland Circuit Court.

J. T. Ellis and *G. S. Pleasants*, for appellant.

J. A. Works and *F. M. Griffith*, for appellee.

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Courtney v. Courtney.

ELLIOTT, J.—America Courtney, the wife of the appellant, Andrew J. Courtney, filed a petition for a divorce. Various orders were made in the cause, among them an order requiring appellant to pay into court for the use of his wife in preparing for trial, the sum of fifty dollars. The appellee was represented by Messrs. Griffith and Works who acted as her attorneys. The appellee duly filed a dismissal in the office of the clerk during vacation, and the clerk entered an order dismissing the suit. Subsequently Messrs. Griffith and Works filed a motion to vacate the order of dismissal, and asking an allowance of fifty dollars for their fee in prosecuting the suit of America Courtney against her husband. The motion was sustained and the allowance decreed.

It is evident that the actual controversy is as to the right of Griffith and Works to a money judgment. It may possibly be true that, as an incident of this right and as collateral to it, the question of the correctness of the ruling vacating the motion to dismiss is involved, but even if this be true the question is incidental and collateral and not controlling. The element which gives character to the case is the demand for the recovery of a judgment for money, and as the recovery sought is only fifty dollars the case is within the jurisdiction of the Appellate Court. It is, therefore, ordered that it be transferred to the docket of that court.

Filed Oct. 10, 1891.

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APPEAL.—Perfection of.—Notice to Co-Parties.—Remedying Defect.—Section 633, R. S. 1881, declares that all appeals must be taken within one year from the time the judgment is rendered. All appeals not taken in accordance with section 638, R. S. 1881, providing for appeals in term time, require notice to be given. Section 635, R. S. 1881, provides that a part of several co-parties may appeal, but in such cases they must serve notice of the appeal upon all the other co-parties, and file the proof thereof in the Supreme Court.

Held, that where a part of several co-parties appeal without complying with section 635 or 638, the defect can not be remedied, after the time limited for effecting appeals has expired, by filing in the Supreme Court a written appearance of a party not appealing and his refusal to join in the appeal.

From the Clinton Circuit Court.

F. M. Trissal, G. Shirts and J. V. Kent, for appellants.

H. Crawford, for appellee.

OLDS, J.—The appellants, John Holloran and George W. Ingberman, brought this suit against the Midland Railway Company. The Midland Railway Company filed a cross-complaint, making the appellants, Holloran, Ingberman, Vincenzo Fiorella, Anthony Frisco, parties defendant to the cross-complaint, and asking for a judgment against all of said defendants. There was a trial before the court without the intervention of a jury. The court made a special finding of facts, and stated its conclusions of law, and on the 15th day of May, 1888, rendered a final judgment jointly against said Holloran, Ingberman, and Fiorella. Holloran and Ingberman filed a motion for new trial, which was overruled, and they took an appeal to this court, and filed the transcript in the clerk's office of this court on the 16th day of November, 1888. Vincenzo Fiorella did not join in the appeal, and no notice of the appeal was served on him.

On the 20th day of March, 1891, the appellee, the Midland

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Railway Company, filed a motion to dismiss the appeal for the reason that the judgment from which the appeal was taken was a joint judgment against Holloran, Ingberman, and Fiorella, and the said Fiorella has not appealed, and has been served with no notice of appeal. The appellants, Holloran and Ingberman, were notified of the motion to dismiss.

Appellants, Holloran and Ingberman, conceding that the motion to dismiss is well taken, on the 5th day of October, 1891, procured the written consent of Fiorella and Frisco to appear and decline to join in the appeal, and filed the same in the clerk's office of this court, together with their motion for leave to amend their assignment of error.

Section 633, R. S. 1881, declares that "Appeals in all cases hereafter tried must be taken within one year from the time the judgment is rendered."

Section 638, R. S. 1881, provides for appeals in term time, and where the provisions of the latter section are complied with no notice is required, but this section requires the fixing of the penalty of the bond and the surety to be given and that the same be approved by the court. When the bond is given and other steps taken, as required by this section, within the time fixed by the court, no notice of appeal is necessary. *Conaway v. Ascherman*, 94 Ind. 187; *Hays v. Wilstach*, 101 Ind. 100; *Goodwin v. Fox*, 120 U. S. 775; *Easter v. Acklemire*, 81 Ind. 163.

In this case there was not a compliance with section 638, *supra*. There was no time fixed for the filing of the bond, and no bond was filed in accordance with the provisions of this section of the statute. All appeals not taken in accordance with section 638, *supra*, require notice to be given. Section 639, R. S. 1881; *Ruschaupt v. Carpenter*, 63 Ind. 359; *Hays v. Wilstach*, *supra*; *Goodwin v. Fox*, *supra*.

Section 635 provides that "A part of several co-parties may appeal; but in such case, they must serve notice of the appeal upon all the other co-parties, and file the proof thereof with the clerk of the Supreme Court." The object of this sec-

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tion is to enable a part of the co-parties to appeal. It does not purport to extend the time allowed for appeal, and it is clear that it was not intended to do so. The time allowed within which an appeal may be taken is one year, whether the appeal be by all or only a part of the co-parties, and the appeal must be perfected within that time.

In the case of *Bacon v. Withrow*, 110 Ind. 94, it was held that when the assignment of errors is not filed in the Supreme Court within one year from the time final judgment was entered in the cause in the trial court, the appeal will be dismissed. The same doctrine was again held in the case of *Lawrence v. Wood*, 122 Ind. 452; *Arbuckle v. Swim*, 123 Ind. 208; *Hawkins v. McDougal*, 126 Ind. 544; *Herzog v. Chambers*, 61 Ind. 333; *Koons v. Mellett*, 121 Ind. 585.

In the case of *Smythe v. Boswell*, 117 Ind. 365, this court said: "It is unquestionably true that the Legislature may limit the time within which appeals may be taken. The limitation operates primarily upon the parties, but it also binds the court, because it is a rule of procedure established by valid legislation. Our decisions are, therefore, right in holding that an appeal must be taken within the time limited by the statute, and that, unless the transcript and the assignment of errors are filed within that time, there is no cause in this court."

In *Joyce v. Dickey*, 104 Ind. 183, it was held that an appeal not taken within one year from the time the case was finally disposed of in the circuit court will be dismissed. *Day v. School City of Huntington*, 78 Ind. 280.

The decisions are unanimous in holding that the appeal must be perfected within the year. The reasons for perfecting the appeal by giving and filing the notice required by section 635, *supra*, when only a part of the co-parties appeal within the year, are just as cogent as that the transcript and assignments of errors shall be filed within the year, and such was evidently the intention of the Legislature.

It has also been held by this court, in the case of *Flory*

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v. *Wilson*, 83 Ind. 391, that the time allowed by law can not be extended by an agreement. If the adverse parties can not extend the time of appeal by agreement, certainly the co-parties or judgment defendants can not extend the time and prevent plaintiff from having his cause disposed of in the Supreme Court. *Buntin v. Hooper*, 59 Ind. 589.

The appeal in this cause not having been taken in term time in accordance with the provisions of section 638, *supra*, and the notice not having been given in accordance with section 635, *supra*, and the appeal perfected within one year from the date of final judgment in the circuit court, the cause was not properly in this court, and the appeal can not be maintained by filing in the clerk's office of this court a written appearance of the judgment defendant not made a party to the appeal, and his refusal to join in the appeal after nearly three years have elapsed from the time of the rendition of final judgment in the circuit court.

The motion to dismiss must be sustained.

Appeal dismissed, at costs of appellants.

Filed Oct. 13, 1891.

No. 15,922.

MORRISON v. CAREY ET AL.

NEW TRIAL.—*Newly-Discovered Evidence.*—*Diligence.*—A party seeking a new trial on the ground of newly-discovered evidence must establish every element of such a case strongly, clearly and satisfactorily. The diligence used to discover the evidence in time to use it on the trial must be fully set forth in the application. It is not sufficient to state generally that he had been diligent in making inquiries of those whom he supposed likely to know anything of the case; all the facts constituting the diligence must be shown.

SAME.—*Character of Newly-Discovered Evidence to Warrant the Granting of a New Trial.*—The newly-discovered evidence must be of a very material and decisive character. It must not be cumulative, and should be such as

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to render it reasonably certain that another trial would bring about a different result.

From the Porter Circuit Court.

A. L. Jones, N. L. Agnew and D. E. Kelly, for appellant.
S. O. Spencer and E. D. Crumpacker, for appellees.

COFFEY, C. J.—On the 21st day of January, 1888, the appellee William H. Carey commenced an action in the Lake Circuit Court against the appellant, to recover on an account for work and labor, for personal property sold and delivered, for money loaned and money paid out and expended by the appellee for the use of the appellant. The venue was changed from Lake to Porter county, where the cause was tried, resulting in a judgment, on the 9th day of November, 1889, in favor of Carey for the sum of three thousand dollars. The judgment was assigned to the appellee Crumpacker on the 7th day of January, 1890.

This action was commenced on the 26th day of May, 1890, to obtain a new trial on account of newly-discovered evidence.

A trial of the cause resulted in a finding and judgment for the appellees, from which this appeal is prosecuted.

This is an independent action, wholly disconnected from the one in which the judgment was rendered, and as such must stand or fall upon its own merits. *Hines v. Driver*, 89 Ind. 339; *Glidewell v. Daggy*, 21 Ind. 95; *Sanders v. Loy*, 45 Ind. 229; *Hiatt v. Ballinger*, 59 Ind. 303.

It is the well settled rule that applications of the kind now before us are regarded by the courts with disfavor. It is said: "Motions of this kind ought to be received with great caution, because there are few cases tried in which something new may not be hunted up, and because it tends very much to the introduction of perjury, to admit new evidence after the party has lost the verdict, has had an opportunity of discovering the points both of his adversary's strength and his own weakness. * * It is infinitely bet-

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ter that a single person should suffer mischief than that every man should have it in his power, by keeping back part of his evidence and then swearing it was mislaid, to destroy verdicts and introduce new trials at their pleasure." *Moore v. Philadelphia Bank*, 5 S. & R. 41; *Baker v. Joseph*, 16 Cal. 173.

In the latter case cited it was said: "Applications for this cause are regarded with distrust and disfavor. The temptations are so strong to make a favorable showing, after a defeat in an angry and bitter controversy involving considerable interest, and the circumstances that the testimony has just been discovered, when it is too late to introduce it, so suspicious, that courts require the very strictest showing to be made of diligence, and all other facts necessary to give effect to the claim."

The law favors the diligent, and punishes the negligent. A party seeking a new trial on account of evidence discovered since the termination of the controversy between him and his adversary must, if he succeed, establish every element of such a case strongly, clearly, and satisfactorily. The strong presumption is that by the proper effort the party might have discovered the evidence and used it on the trial; and that his failure to do so is owing to intentional omission, or to unpardonable neglect, and to overcome this presumption a case must be made free from delinquency. The diligence used must be fully set forth in the application. If it consisted in making inquiries, the time, place, and circumstances must be stated, to the end that the court may know that such inquiries were made in the proper quarter, and in due season. It is not sufficient to state generally that he had been diligent in making inquiries of those whom he supposed likely to know anything of the case; all the facts constituting the diligence must be shown.

The newly-discovered evidence must be of a very material and decisive character. It must not be cumulative, and should be such as to render it reasonably certain that an-

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other trial would bring about a different result. *Ward v. Voris*, 117 Ind. 368; *Hines v. Driver*, 100 Ind. 315; *Pemberton v. Johnson*, 113 Ind. 538.

In this case some of the newly-discovered evidence is merely cumulative, and need not be considered. That which is not cumulative consists of declarations made by the appellee Carey nearly sixteen years before the trial of this cause. It is not claimed that the appellant made any effort to discover this evidence previous to the trial of the cause between him and Carey, but it is urged as an excuse for not making such effort that he did not know, and had no reason to believe, that such evidence existed. Each of the witnesses upon whose evidence a new trial is sought was orally examined on the trial of this cause. Evidently the circuit court, after hearing all the evidence, reached the conclusion that the appellant had not used that diligence to discover this evidence, before the trial of the former cause, which the law requires.

It probably, also, reached the conclusion that the newly-discovered evidence was not of a character to change the result.

With these conclusions of the circuit court we can not interfere.

The declarations were not well identified, and, as to some of them the witnesses differ as to what was actually said. Considering the time that had intervened between the declarations and the trial of this cause, and the imperfections attaching to this class of testimony, we can not say that the court erred in holding it not sufficient to warrant the granting of a new trial.

Judgment affirmed.

Filed Oct. 9, 1891.

The State v. Matthews.

No. 15,980.

THE STATE v. MATTHEWS.

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CRIMINAL LAW.—Filing Information.—Order-Book Entry.—It is not necessary for the clerk to make an order-book entry of the filing of an information. The mere statement of the clerk that an information was filed, as shown by his file-mark on the back of an information, is sufficient *prima facie* to give jurisdiction.

SAME.—Dismissal of Appeal —Insufficient Showing for.—Where it is not made to appear that an entry of such filing was made by the clerk upon the order book, the alleged failure of the clerk to copy into the transcript the order-book entry showing the filing of the affidavit in the court below is not available for a dismissal of the appeal in a criminal case, where the clerk states in the transcript that the affidavit and information were filed.

SAME.—Embezzlement.—Surviving Partner.—Person Acting in Fiduciary Capacity.—Who is.—A surviving partner, who is engaged under the statute in winding up the partnership affairs, is acting in a "fiduciary capacity" within the meaning of section 1952, R. S. 1881, defining the crime of embezzlement by administrators, executors, or other persons acting in a fiduciary capacity.

SAME.—Assets.—When Deemed in Possession of Surviving Partner by Virtue of Trust.—When a surviving partner has filed the inventory and bond required, and entered upon the discharge of the duties imposed upon him by law, the assets of the partnership come into his possession by virtue of the trust within the meaning of section 1952.

SAME.—Sufficiency of Information.—An information for embezzlement under the above section, which charges that the money came into the defendant's hands as such surviving partner, is good upon motion to quash.

From the Harrison Circuit Court.

A. G. Smith, Attorney General, C. W. Cook, Prosecuting Attorney, T. J. Wilson, W. N. Tracewell and R. J. Tracewell, for the State.

M. W. Funk and W. Ridley, for appellee.

MILLER, J.—This is an appeal from the judgment of the court sustaining a motion to quash an information charging the commission of a crime.

A preliminary question is raised by a motion to dismiss the appeal, because it is claimed that the transcript does not con-

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tain all the entries in the cause, and is not, therefore, full, true and complete.

The specific omission is said to consist in the failure of the clerk to copy the order-book entry showing the filing of the affidavit and information in the court below. We find in the transcript, immediately preceding the affidavit, a statement of the clerk that on the 24th day of September, 1890, during the September term of the court, the State, by her prosecuting attorney, appeared and filed with the clerk the affidavit and information which follow.

We can not judicially know, and are not otherwise informed, that an entry of such filing was made by the clerk upon the order-book, and must therefore overrule the motion.

It may not be improper to add that the statute does not require informations to be filed in term time and in open court, as in cases of presentment for crime by indictment, and, therefore, cases holding that the record must show the returns of indictments in open court are not in point.

It may be proper practice on the part of clerks to make order-book entries of such filing, but we are satisfied that the mere statement of the clerk, as shown by his file-mark on the back of an information, is sufficient *prima facie* to give jurisdiction; and in the absence of objection made in the trial court, we will presume in favor of the regularity of the proceedings. *App v. State*, 90 Ind. 73.

The facts charged in the information are, in brief, that on, and prior to, November 8th, 1889, the defendant and one James Woodward were doing business as partners; that on that day Woodward died, and that afterwards the defendant, as the surviving partner of the late firm, filed his bond, qualified, and entered upon the discharge of his duties as such; that afterwards, in June, 1890, the defendant, having failed to give an additional bond, as ordered by the court, was removed, and a receiver appointed of the firm assets, who qualified and entered upon the discharge of his duties as such

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receiver ; that there came into the hands of the defendant as such surviving partner, and of the moneys and assets of said partnership and belonging thereto, the sum of fifteen hundred and sixty-two dollars in current money of the United States ; that on the 20th day of September, 1890, the defendant, Halleck Matthews, did then and there feloniously fail and refuse to pay over the said sum collected and received by him as such surviving partner, on demand, then and there made, to the receiver, who was then and there entitled to receive the said money—the said defendant not then and there having a good cause for so failing and refusing to pay said money to said receiver.

The information is predicated upon section 1952, R. S. 1881, which, omitting the portion fixing the punishment, is as follows :

“ Whoever, being the administrator of the estate of a decedent, or the executor of a last will, or guardian of any minor or insane person, or trustee or other person acting in any fiduciary capacity, without good cause, fails or refuses, when legally required by the proper person or authority, to account for or pay over to such person or persons as may be lawfully entitled to receive the same, any money, choses in action, or other property which may have come into his hands by virtue of his office, duty, or trust, shall be deemed guilty of embezzlement.”

The information was quashed, as we are informed in the brief of counsel, upon the assumption that the above-quoted section does not embrace a surviving partner who is proceeding under the statute to wind up the partnership affairs.

It is well settled that a partner can not commit a crime by any acts relating to the possession of the partnership property, such as embezzlement, larceny or burglary, for he is both principal and agent. *Bates Partnership*, section 277 ; *Soule v. Hayward*, 1 Cal. 345 ; *State v. Butman*, 61 N. H. 511 ; *Napoleon v. State*, 3 Tex. App. 522 ; *Jones v. State*, 76 Ala. 8 ; *Becket v. Sterrett*, 4 Blackf. 499. Also that our stat-

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ute relating to the settlement of partnerships by the surviving partner does not change or affect his interest in or right of possession of the partnership assets, but that he is the legal owner of the assets (*Wilson v. Nicholson*, 61 Ind. 241), and may make a voluntary assignment of the partnership assets, or prefer one firm creditor over the others by the execution of chattel mortgages. *First Nat'l Bank v. Parsons*, 128 Ind. 147; *Hadley v. Milligan*, 100 Ind. 49.

A number of cases may be found in which it has been held that even a slight interest in the property converted was sufficient to shield the abstractor from punishment, but upon examination it will be found that the statutes upon which the prosecutions were predicated defined embezzlement as a conversion of the "property of another;" and the cases, therefore, are of little or no weight when applied to the construction of the section of our statute under consideration where these controlling words are omitted. *State v. Kusnick*, 45 Ohio St. 535.

It will be observed that surviving partners are not enumerated as one of the class against whom the act is directed, and if included it must be under the words "or trustee or other person acting in any fiduciary capacity." By the rules of construction the trustee or person acting in the fiduciary capacity must be of the same class as those enumerated, viz., administrators, executors and guardians. *Nichols v. State*, 127 Ind. 406; Sutherland Stat. Const., section 270, *et seq.*; Endlich Int. Stat., section 405.

In determining whether a surviving partner is within the class enumerated, we must look to the statutes defining his duties and powers rather than to definitions given in standard dictionaries, which, owing to the changes made by statute, might be misleading rather than helpful.

By the act in force since July 2d, 1877, sections 6046 to 6053, R. S. 1881, it is provided that upon the death of a partner the survivor or survivors shall proceed to settle and close up the partnership affairs in accordance with the law

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now in force and the provisions of that act. Within sixty days he must make an inventory and have the assets appraised, one of the appraisers being selected by the clerk of the court having probate jurisdiction, and the inventory and appraisement when made are to be filed in the office of this clerk, and verified by the oath of the surviving partner as to its completeness. When this bond is filed, such surviving partner is required to execute a bond in a sum double the amount of the interest of the decedent, conditioned for the "faithful performance of his or their *trust*." Upon the settlement of the partnership business the surviving partner or partners are required to report the same to the court, and pay the surplus belonging to the deceased partner into court to be paid out on the order of the court. Two years are given in which the settlement is to be made, unless the time shall be extended by the court. It is also provided that if the surviving partner fails to file the bond required of him within ten days after filing the inventory and appraisement, or shall fail to file the inventory or appraisement within the time required, the court shall appoint a receiver who shall proceed to settle the trust as though a voluntary assignment for the benefit of creditors had been made. Power is also given to the court to appoint a receiver if, upon a hearing, it shall be convinced that the partnership business is not being properly settled.

This act, while it leaves the title of the property, and upon filing the inventory, appraisement and bond, the possession of the same, in the surviving partner, gives a supervising control to the court having probate jurisdiction, and appears to be modelled upon the act for the settlement of decedents' estates. The duties and liabilities of the surviving partner who undertakes to settle the partnership business under this act are similar to the duties required of administrators, executors and guardians, more analogous in fact than any other class of persons to whom our attention has been called. We are satisfied that surviving partners

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when engaged in the settlement of the partnership affairs under the provisions of the statute are acting in a "fiduciary capacity," within the meaning of this act. To refuse to so hold would be the equivalent of holding that these words are without meaning, and it is our duty to give, if possible, some effect to every provision of the act.

We are not unaware of the existence of a strong line of cases holding that surviving partners are only trustees in a limited or qualified sense, but in none of them does it appear that the surviving partner was required by local statutes to give bond for the faithful performance of his trust in order to retain possession of the partnership property and settle its business.

There is much force in the argument that a surviving partner holds, not by virtue of any trust relation, but as the owner of the property, and in the ordinary meaning given to the term "embezzlement," this would be fatal to the information. The definition of embezzlement is given us by the section of statute under consideration; we are informed by the act just what is sufficient to constitute embezzlement, and there is no suggestion of ownership in another being an element in the crime.

In *State v. Kusnick*, *supra*, attention is called to the fact that in an amendment of the statute defining the crime, the words "property of another" are omitted, which was held to wholly eliminate the element of exclusive ownership by another as an ingredient in the crime.

In *People v. Mahlman*, 82 Cal. 585, in construing a similar act, the court says: "It does not say that, being an officer, if he is a member of the association, he shall not be guilty if he commits the act denounced, but it makes no exception, and enacts a sweeping declaration that all 'officers,' etc., whatsoever, without any reserve, who do the acts described therein, shall be held as embezzlers and punished as such."

If we look to the classes of officers who are enumerated,

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we find executors and administrators, who are frequently, if not usually, interested financially in the property or money which they hold as such.

The objection that a surviving partner holds the partnership assets as owner, and that he has a right to them, and can not therefore be guilty of their embezzlement, whatever force it might have if applied to some of the other sections of this act defining the crime of embezzlement by employees, bailees and others, can have no effect when applied to the crime of embezzlement by fiduciaries. The crime does not consist in the unlawful conversion of the trust property—that is not mentioned or made an element in the crime—but it consists in the simple act of refusing, without good cause, when legally required by the proper person or authority, “to account for or pay over to such person or persons as may be lawfully entitled to receive the same,” the money which may have come into their hands by virtue of the office or trust.

Whatever may be the rights in or title to the property in the hands of a surviving partner up to the time when a demand is made by some one lawfully entitled to receive the same, from that time it becomes wrongful and tortious.

Applying this rule to the allegations contained in the information, we may assume that the possession of the appellee, until he was removed by the court, and until the receiver made a demand for the money, was right and proper, but that upon demand made it became his duty, unless he had good cause for refusing, to pay over the money, and if such refusal was felonious it was, according to the provisions of the statute, an embezzlement of the funds so withheld. The language of the section of the crime act we are examining requires that the money, choses in action, or other property, which he refuses to pay over, shall have come into his hands “by virtue of his office, duty or trust,” and it is claimed that the money charged to have been embezzled simply remained in his hands, upon the death of his partner as its owner, and that, therefore, the act does not apply. We are of the opin-

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ion that when a surviving partner has filed the inventory and bond required, and entered upon the discharge of the duties imposed upon him by law, the assets of the partnership are within his possession by virtue of the trust, and may be said to have come into his hands as such at the time he takes upon himself the duties imposed by the act. The information expressly charges that the money came into his hands as such surviving partner; this we hold is a sufficient allegation to make the information good upon motion to quash.

The question of the sufficiency of the affidavit and information upon other grounds has not been argued in such manner as to call our attention to its various allegations, and we have confined ourselves strictly to the objections pointed out, and do not, therefore, pass upon its sufficiency, except as indicated in this opinion.

Judgment reversed, with instructions to proceed in accordance with this opinion.

Filed Oct. 14, 1891.

No. 15,229.

RARIDEN, ADMINISTRATOR, v. RARIDEN.

NEW TRIAL.—*As of Right.*—*Foreclosure of Mortgage.*—In a suit to foreclose a mortgage, brought by the assignee thereof, where the only question involved is as to the right of such assignee to foreclose the mortgage notwithstanding a release executed by the assignor, the ownership of the land is not in controversy, and the unsuccessful party is not entitled to a new trial as of right.

SAME.—*Special Verdict.*—Such a suit is triable by the court, and it is not bound by the facts stated in the special verdict, which is merely advisory.

From the Howard Circuit Court.

J. S. Scobey, for appellant.

J. A. Swoveland, J. C. Blacklidge, W. E. Blacklidge and B. C. Moon, for appellee.

Rariden, Administrator, v. Rariden.

ELLIOTT, J.—The appellant seeks by his complaint to foreclose a mortgage executed to Moses Wilson and by Wilson assigned to the appellant. The mortgage was executed by Wilson T. Rariden. The appellee subsequently became the owner of the mortgaged premises. The complaint alleges that the original mortgagee, Moses Wilson, after the assignment to the appellant, executed a release of the mortgage, which he caused to be recorded. A cross-complaint was filed by the appellee, in which she asserted title, and asked that it be quieted against the lien of the appellant. The court directed a special verdict, and one was returned pursuant to that direction. The verdict shows the execution of the mortgage, shows ownership of the land in the appellee; shows, also, the execution of a release by the original mortgagee, Moses Wilson. The appellant unsuccessfully moved for a new trial as of right.

It is clear that the trial court did not err in denying the motion of the appellant for a new trial under the statute. There was no controversy as to the ownership of the land; the real controversy was as to the appellant's right to enforce the mortgage notwithstanding the release executed by his assignor. He asserted no other right than that, and all the pleadings of the appellee were directed to a defeat of that right. Both parties claim under Wilson T. Rariden, he was the common source of the rights asserted, and the issue tried and determined was simply as to the right of appellant to enforce the mortgage.

It may be possible that the decree rendered is too broad, but in so far as it decrees that the title of appellee is superior to the lien of the mortgage sought to be foreclosed it is correct. If, however, it were erroneous, it would not entitle the appellant to a new trial under the statute. The object of the suit was to foreclose a lien, and the real contest was as to the right to enforce the lien, and it is well settled that such a case is not within the statutory rule. *Jenkins v.*

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Corwin, 55 Ind. 21; *Williams v. Thames, etc., Co.*, 105 Ind. 420; *Voss v. Eller*, 109 Ind. 260; *Sterne v. Vert*, 111 Ind. 408; *Bradford v. School Town, etc.*, 107 Ind. 280; *Wilson v. Brookshire*, 126 Ind. 497; *Gullett v. Miller*, 106 Ind. 75.

The suit was one for trial by the court, and it was not bound by the facts stated in the special verdict, for that verdict was merely advisory. *Platter v. Board, etc.*, 103 Ind. 360; *Koons v. Blanton, post*, p. 383. The question, therefore, as to the correctness of the decision of the court is not in the record.

If, however, we should treat the case as an ordinary action at law, it would do the appellant no good. There was no motion directed against the verdict, nor any motion to modify the decree. The motion for a new trial did not assail the verdict nor the decree. The evidence is not in the record, and no question is presented upon the motion for a new trial for cause.

Judgment affirmed.

Filed Oct. 13, 1891.

No. 15,917.

BURRELL v. THE STATE.

GRAND JURY.—*Excusing Juror.—Presumption.*—Where, under section 1649, R. S. 1881, authorizing the court to excuse grand jurors from attendance for certain reasons, a grand juror is excused by the court, and the reason for his excuse is not shown by the record, it will be presumed that he was excused upon some of the grounds prescribed by the statute.

SAME.—*Vacancy.—Selection from By-Standers.*—Where grand jurors are excused the vacancy may be filled by a selection from the by-standers.

SPECIAL JUDGE.—*Appointment of.—Statute.*—Section 4 of the act of March 1st, 1855 (2 Davis Stat. 10), relative to the appointment of special judges, is still in force, except in so far as it is in conflict with the act

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of March 7th, 1877 (Acts 1877, p. 28), and the appointment of a judge *pro tem.* by the regular judge, who is unable to preside at a term of court on account of illness, is valid.

CRIMINAL LAW.—*Change of Venue.*—*Defective Transcript.*—*Voluntary Appearance of Defendant.*—*Jurisdiction.*—Where the venue of a criminal cause was changed on motion of the defendant, and a transcript was filed in the clerk's office of the court to which the change of venue was taken, which transcript was defective, but it appeared by the record that after the filing of such defective transcript, the cause was continued by "consent of parties,"

Held, that it will be presumed that the defendant voluntarily appeared, and submitted himself to the jurisdiction of the court, and consented to a continuance; that the court had jurisdiction, the appearance and agreement constituting a waiver of any mere technical informality in the transmission and certification of the papers.

SAME.—*Assault with Intent to Kill.*—*Instruction.*—In a prosecution for assault with intent to kill, it is not error to refuse to charge the jury that, if the evidence showed that the defendant was not interfering with the prosecuting witness, and was seized by him, and in the effort to get away the pistol was discharged, and the prosecuting witness was injured, the defendant should be acquitted.

SAME.—*Instruction.*—Nor is it error to refuse to charge that "A saloon is a public place in which all persons that so desire may go, and no one has a right to expel another therefrom by force and violence," since those in charge of a saloon may lawfully expel therefrom one who is guilty of gross misconduct and in so doing may use such force as is reasonably necessary to accomplish that result.

From the Orange Circuit Court.

F. Branaman, T. B. Buskirk and B. H. Burrell, for appellant.

A. G. Smith, Attorney General, W. T. Branaman, Prosecuting Attorney, for the State.

MCBRIDE, J.—The appellant was convicted of an assault and battery with intent to kill. He insists that the judgment of conviction is erroneous, upon several grounds. His first contention is, that the grand jury which indicted him was illegally selected and empanelled. This question he raised by a plea in abatement, to which the circuit court sustained a demurrer. The record shows that six grand jurors were regularly drawn by the clerk and jury commis-

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sioner, but that only three of them appeared, one of whom was excused. The reason for his excuse is not shown by the record. The number necessary to complete the grand jury were then selected from the by-standers, and, after examination as to their qualifications, were sworn. It is not claimed that any member of the jury lacked any legal qualification, or that any fraud was practiced in their selection.

Section 1649, R. S. 1881, authorizes the court to excuse grand jurors from attendance for certain reasons. When a grand juror is excused by the court, and the reason for his excuse is not shown by the record, it will be presumed that he was excused upon some of the grounds prescribed by the statute.

Section 1651 authorizes the court, when a full jury does not attend, to complete the number from the by-standers. When the power is given to excuse a juror, the power to fill the vacancy thus occasioned, by another, possessing the necessary qualifications, is also conferred by necessary implication. The demurrer to the plea in abatement was correctly sustained.

The cause was tried before Hon. S. B. Voyles, acting as special judge, or judge *pro tem.*, of the Orange Circuit Court. The appellant contends that his appointment was without authority and void. The question is properly saved and presented. The order appointing the special judge is spread upon the record, and is as follows:

"Whereas, I, Thomas L. Collins, judge of the 42d judicial circuit court, within and for said State, of which the county of Orange forms a part, being unable on account of illness to attend and preside at the March term of the circuit court in Orange county, Indiana, in 1890, hereby appoint Samuel B. Voyles, an attorney eligible to the office of such judge, to preside at said term of said Orange Circuit Court as judge *pro tem.* thereof. Dated at Salem, March 17th, 1890.

THOMAS L. COLLINS,

"Judge of Orange Circuit Court."

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Then follow an acceptance of the appointment and the oath of office.

The appellant's objection to the validity of this appointment is based on the assumption that the only authority for appointing a judge *pro tem.* is found in section 1381, R. S. 1881. In this he is in error. It has been several times decided by this court that section 4, of the act of March 1st, 1855 (2 Davis Stat. 10), is still in force, except in so far as it is in conflict with the act of March 7th, 1877 (Acts 1877, p. 28), and that such appointments as that in question herein are still authorized by it. *Zonker v. Cowan*, 84 Ind. 395; *State, ex rel., v. Murdock*, 86 Ind. 124; *Bowhus v. Brier*, 87 Ind. 391.

The appellant also questions the jurisdiction of the Orange Circuit Court.

The indictment was returned and the prosecution was commenced in the Jackson Circuit Court. On motion of the appellant the venue was changed to the Orange Circuit Court. The order granting the change of venue was made August 19th, 1889, and the clerk was ordered to make out and transmit a transcript and the files to the Orange Circuit Court. The transcript was filed in the office of the clerk of Orange Circuit Court September 20th, 1889, but was defective.

The record of the Orange Circuit Court shows that on the 14th day of October, 1889, which was the first day of the October term, 1889, of that court, the cause was continued "by consent of parties."

At the January term, 1890, of the Orange Circuit Court, the court, on motion of the prosecutor, in the absence of the accused, granted a rule against the clerk of the Jackson Circuit Court to amend the transcript. To this counsel for the appellant, who were present, objected, and an exception was saved. March 6th, 1890, an amended and corrected transcript was filed. On the 17th day of March the appellant moved to quash and strike out the transcript. The motion was overruled, and an exception saved.

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It is upon these facts that the appellant questions the jurisdiction of the Orange Circuit Court.

When the change of venue was granted and the cause ordered transferred to the Orange Circuit Court, it became the duty of the clerk of the Jackson Circuit Court to make and transmit a correct transcript, together with the files. Whenever he learned in any manner that he had forwarded an imperfect transcript, he had the right, and it was his duty, to correct his mistake, and thus comply fully with the order made. It is therefore not material whether the Orange Circuit Court was, or was not, authorized to make an order requiring him to do his duty. It is not denied that the last transcript is correct and complete.

In our opinion, if the appellant was in a position to raise the question, it would not avail him. We think, however, he is precluded by the record from raising this point, even if there is any merit in it. The record of the Orange Circuit Court shows, as above stated, that on the 14th day of October, 1889, the cause was continued "by consent of parties." While the record does not otherwise affirmatively show that the appellant was in court at that time, it will be presumed that he was, as every legal presumption favors the action of the court. *Welsh v. State*, 126 Ind. 71.

It will be presumed, therefore, that the accused voluntarily appeared in the Orange Circuit Court at that time and submitted himself to its jurisdiction, and consented to a continuance. At that time a transcript and the files were in fact on file in that court, and such appearance and agreement constitute a waiver of any mere technical informality in the transmission and certification of the papers.

The appellant asks that the case be reversed on the evidence. The evidence is full, and tends to sustain the verdict on every material point. We can not set the verdict aside upon that ground.

The appellant also complains of the refusal of the court to give special instructions asked by him and numbered 2,

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3, 4 and 5. No. 2 is as follows: "If the evidence in this case shows that the defendant was on one of the public streets of the town of Brownstown, Indiana, at the time of this difficulty, and was not interfering with the injured party, and was seized by the injured party, and in the effort to get away from such party the pistol was discharged, and the prosecuting witness was injured, then in that case the defendant would not be guilty of any crime and should be acquitted." This instruction is erroneous upon so many grounds it is hardly necessary to particularize. We will merely suggest that it seems to have been drawn on the assumption that the only thing which could justify the seizure of the appellant by the prosecuting witness would be his "interference" with the latter, and that being seized by the prosecuting witness was in itself sufficient to justify shooting him in the effort to escape, or "get away" from him.

No. 3 is as follows: "A saloon is a public place, in which all persons that so desire may go, and no one has a right to expel another therefrom by force and violence." This the appellant insists is sustained by *Connors v. State*, 117 Ind. 347. That case is not susceptible of any such interpretation. True, it is there said that a saloon is, in a sense, a place of public entertainment, but those in charge of a place of public entertainment may lawfully expel therefrom one who is guilty of gross misconduct, and in so doing may use such force as is reasonably necessary to accomplish that result.

Those who are licensed in this State to sell intoxicating liquors are required to give bond that they will "keep an orderly and peaceable house," and it is not only their right but their duty to do so, and if necessary to eject therefrom those who are disorderly and quarrelsome. This will not justify them in using unnecessary force in expelling persons from their premises, and they would of course be liable if

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they did so, but it can not be said that no one is authorized to expel another from a saloon.

It is unnecessary to encumber the record by copying instructions Nos. 4 and 5 asked for, for No. 4 has no bearing whatever upon the case, while No. 5 is upon the law of self-defence, and the court had already given to the jury a very fair and clear instruction covering that ground; and it was, therefore, not error to refuse it, assuming that it stated the law correctly.

The appellant moved in arrest of judgment and his motion was overruled. The only argument advanced to show that this was error is based on the assumption that the indictment charges an assault with intent to kill. The indictment charges an assault and battery, with intent, etc., and is clearly good. There is no error in the record.

Judgment affirmed.

Filed Oct. 10, 1891.

No. 16,126.

THE STATE, EX REL. YANCEY, v. HYDE.

CONSTITUTIONAL LAW.—Title of Laws.—The act of February 25th, 1891, (Acts 1891, p. 29), entitled "An act creating the office of State supervisor of oil inspection, prescribing the duties thereof and providing for the appointment of such supervisor, abolishing the office of chief of the division of mineral oils and State inspector of oils, repealing all laws inconsistent therewith, and declaring an emergency," is not unconstitutional as violating the constitutional provision that "Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title."

SAME.—Statutory Office.—Termination of by Legislature.—The term of the incumbent of a statutory office may be ended by the Legislature at any time, and provision made for the selection of his successor.

SAME.—Abolishing Office.—Creation of New One.—Where the Legislature in abolishing one office and creating another determines that the new duties to be performed or new burdens imposed are sufficient to make a

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| 149 | 184 |
| 151 | 568 |
| 151 | 700 |
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new office, such determination will not be interfered with by the Supreme Court if the act is otherwise valid.

CASE.—*State Supervisor of Oil Inspection.*—*Appointment of by State Geologist.*—Under section 1, article 15, of the Constitution, providing that "All officers whose appointments are not otherwise provided for in this Constitution shall be chosen in such manner as now is, or hereafter may be, prescribed by law," the Legislature may confer upon the State geologist the power to appoint a State supervisor of oil inspection.

From the Marion Circuit Court.

A. J. Beveridge, D. H. Chase, D. C. Justice, J. W. Vesey, O. H. Bogue, A. L. Brick, J. S. Engle, G. W. Faris, S. R. Hamill, — Bear and — Bear, for appellant.

J. E. McCullough, L. P. Harlan and A. G. Smith, Attorney General, for appellee.

COFFEY, C. J.—The facts in this case, as they are disclosed by the information, are that, on the 8th day of November, 1889, the relator was appointed to the office of State inspector of oils for the State of Indiana, by the Governor, and was duly commissioned to hold his office for the period of two years from that date. He qualified on the 11th day of the same month, and entered upon the discharge of the duties of the office, and has ever since continued to discharge such duties. On the 13th day of March, 1891, the Governor appointed the relator to the office of State supervisor of oil inspection for this State, and issued to him a commission to serve for the period of four years from that date, and on the 24th day of the same month he qualified as such officer. In the month of March, 1891, whether before or after the appointment of the relator does not appear, Sylvester S. Gorby, the State geologist, appointed the appellee to the office of State supervisor of oil inspection, under the terms of an act of the General Assembly passed in 1891.

Under this appointment the appellee qualified and entered upon the discharge of the duties of said office. No commission was issued by the Governor to the appellee, nor does it appear that the commission last above mentioned, issued to

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the relator, was attested by the secretary of state, or that the seal of the State was thereto attached.

This action was commenced by the appellant in the Marion Circuit Court to determine the right to the office, and to an information setting forth the above facts the court sustained a demurrer.

The propriety of this ruling presents the question for our consideration.

The last session of the General Assembly passed an act containing the following title :

"An act creating the office of State supervisor of oil inspection, prescribing the duties thereof, and providing for the appointment of such supervisor, abolishing the office of chief of the division of mineral oils and State inspector of oils, repealing all laws inconsistent therewith, and declaring an emergency."

The act creates the office of State supervisor of oil inspection, and provides that immediately upon the taking effect of the act the State geologist shall appoint a skilled and suitable person, a resident of the State, not interested in any way in manufacturing, dealing or vending any illuminating oils manufactured from petroleum, as State supervisor of oil inspection, whose term of office shall be for the term of four years from the date of his appointment. In case of a vacancy, at any time, the act requires the State geologist to fill the same. The State supervisor of oil inspection is subject to removal at any time by the State geologist for any neglect or violation of duty enjoined by law. The act requires the supervisor to appoint deputies, and provides that he and his deputies shall in all respects perform the duties heretofore required by law of the chief of division of mineral oils and his assistants, or State inspector of oils and his deputies, and that they shall receive therefor the same fees and compensation provided by law for the chief of the division of mineral oils and his assistants, or State inspector of oils and his deputies.

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The State supervisor is required to make a report to the State geologist on the second Monday of January in each year of the inspections made by him and his deputies during the preceding year. He and his deputies are required to comply with the law in force pertaining to the inspection of oils.

The second section of the act reads as follows :

“ The office of State inspector of oils, as created by section 2 of ‘ An act providing for the inspection of all kinds of oil that shall be used for illuminating or combustive purposes, regulating the sale of said oil, providing for certain appointments and removals to be made by the Governor, defining what shall constitute certain misdemeanors, prescribing penalties, repealing certain laws, and containing other matters properly connected therewith, ’ approved April 11th, 1881, as well as the office of chief of the division of mineral oils, created by section 6 of ‘ An act establishing a department of geology and natural resources of the State of Indiana and providing for a director of the department, abolishing the department of geology and natural history, and the office of State geologist connected therewith, abolishing the offices of mine inspector and State inspector of oils ; repealing all laws or parts of laws conflicting with any of the provisions of this act and declaring an emergency, ’ passed over the Governor’s veto and in force February 26th, 1889, are hereby abolished ; and all the duties and requirements now and heretofore devolved by law upon such officers shall be performed by the State supervisor of oil inspection.”

The act repeals all laws and parts of laws inconsistent with its provisions and contains an emergency clause.

It is contended by the appellant that this act is unconstitutional for the reasons :

First. That the same is in conflict with the provisions of section 19, article 4, of the Constitution, which reads as follows : “ Every act shall embrace but one subject and mat-

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ters properly connected therewith ; which subject shall be expressed in the title."

Second. That the General Assembly has no power, under the Constitution, to confer on the State geologist the right to appoint to the office in controversy.

Third. That the act is in conflict with the provisions of section 8, article 6, of the Constitution, which reads as follows: "All State, county, township, and town officers may be impeached, or removed from office, in such manner as may be prescribed by law."

The construction to be placed upon section 19, article 4, *supra*, we regard as settled by the ably written opinion in the carefully considered case of *Hingle v. State*, 24 Ind. 28. Expressing regrets that the cases upon the subject of the construction of this constitutional provision were in conflict, the court, after a careful review of the cases, reached the conclusion that the mischiefs intended to be prevented by this section were two, namely :

"*First.* The passage of any act under a false and delusive title, which did not indicate the subject-matter contained in the act ; a trick by which members of the Legislature had been deceived into the support of measures in ignorance of their true character.

"*Second.* The combining together in one act of two or more subjects having no relation to each other ; a method by which members, in order to procure such legislation as they wished, were often constrained to support and pass other measures obnoxious to them, and possessing no intrinsic merit."

The same ruling was made in the case of *Farbach v. State*, 24 Ind. 77.

Had the General Assembly passed a separate act entitled "An act abolishing the office of chief of the division of mineral oils, and State inspector of oils," containing the provisions found in the act before us, no one would doubt that the office previously held by the appellant was abol-

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ished, and that the title was sufficiently broad to cover the act. So if it had passed a separate act entitled "An act creating the office of State supervisor of oil inspection, prescribing the duties thereof, providing for the appointment of such supervisor," followed by the provisions upon that subject found in the act before us, it could not be doubted that a new office had been created, the mode of his selection prescribed and his duties fixed, and that the title of such act was sufficient. Indeed, we do not understand the counsel for appellant as contending that the act in question is not covered by the title, but the contention is that the act does not, in fact, do what it purports to do. The argument is that an office consists of duties to be performed, services to be rendered, directions to be followed and emoluments to be received, and not in a name, and that for this reason the act does not abolish one office and create another.

Many definitions of an office are set out in the able brief filed on behalf of the appellant, but we deem it unnecessary to set them out, or to analyze them in this opinion, for assuming that the essence of an office consists of duties to be performed, services to be rendered, directions to be followed and emoluments to be received, we do not think it follows that the General Assembly, by the act under consideration, did not abolish one office and create another. In considering statutes it is our duty to ascertain, if possible, the intention of the legislative body, and when that intention is ascertained it is our duty to enforce it, unless it violates some provision of the Constitution. The case of *State, ex rel., v. Wiltz*, 11 La. Ann. 439, is not in point here, for in that case it was expressly held by the court that the Legislature did not intend to abolish one office and create another, and the decision turns upon the question of the legislative intent. Here there is no doubt as to the intention of the Legislature.

As we understand the brief for the appellant, it is conceded that it was the intention to vacate the office held by

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the appellant with a view of making a place for some other person, and this the Legislature undertook to do by abolishing the office held by the appellant and creating one to be filled by an appointment made by the State geologist. This, we think, was the plain intention, and this, we think, the Legislature has done, unless there is some provision of our Constitution which prohibits such legislation.

It is perfectly plain, we think, that there is now no office known as the chief of division of mineral oils, nor is there any office known by the name of the State inspector of oils, but it is equally plain that there is an office known as the office of State supervisor of oil inspection.

Offices are neither grants nor contracts, nor obligations which can not be changed or impaired. They are subject to the legislative will at all times, except so far as the Constitution may protect them from interference. Offices created by the Legislature may be abolished by the Legislature. The power that creates can destroy. The creator is greater than the creature. The term of an office may be shortened, the duties of the office increased, and the compensation lessened, by the legislative will. *Coffin v. State, ex rel.*, 7 Ind. 157; *Walker v. Dunham*, 17 Ind. 483; *Walker v. Peelle*, 18 Ind. 264; *Gilbert v. Board, etc.*, 8 Blackf. 81; *Ellis v. State*, 4 Ind. 1; *Jeffries v. Rowe*, 63 Ind. 592.

In the case of *Walker v. Peelle, supra*, the term of Mr. Walker, as State printer, had been shortened by an act of the Legislature. His second point in the case was that the Legislature did not possess the power to shorten his term of office, and upon this subject the court said: "Upon the second point, as to the power of the Legislature to make such enactments, we do not propose to spend much time. We suppose, as the office was created by that body, that it is, in this particular, under its control."

The power of the Legislature to shorten the term of a statutory office, so as to affect an incumbent, once conceded, it is not difficult to see that there is no limit to such power.

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If it may shorten the term of a three years' office to two years, it may fix the term at one year or at one hour. In other words, the length of time a particular person shall hold is absolutely within the discretion of the Legislature.

It is not claimed that there is any constitutional provision restraining the Legislature in this matter except section 8, article 6, above set out.

In our opinion it is not the purpose of this section to control legislative action upon the subject we are now considering. It was no doubt foreseen by the Constitutional Convention that some officer of the kind named might prove unfaithful to his trust, and the purpose of this provision was, we think, to enable the Legislature to pass such laws as would authorize his removal, by legal process, whether such office was created by statute or by the Constitution then under consideration.

The effect of the act we are now considering was to put an end to the appellant's term of office, and to provide a new mode of selecting some one to discharge, at least some, if not all, of the duties theretofore discharged by the appellant, and that whether the office of State supervisor of oil inspection is to be regarded as a new office or an old office under a new name, the intention to produce this result is plain, both from the title of the act and from its provisions. In order to end the appellant's term of office we do not think it was necessary to abolish the office held by him. As it is a statutory office, it was within the power of the Legislature to end the term of the incumbent at any time, and make provision for the selection of a successor.

But we think the appellant is in error in his position that the office of supervisor of oil inspection is an old office under a new name. We think it is in fact what it purports to be, a new office. It is true that the general duties to be performed by the incumbent of this office are the same as those performed by the appellant, but it can not be said that no new duty is imposed.

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The imposition of public duties, to be compensated by emoluments received by the person performing such duties, generally constitutes a public office, but it is not true that a public office may not exist without the imposition of duties or the receipt of emoluments, as plainly appears by reading the Constitution, the provisions of which we are now considering. No duties are prescribed or emoluments fixed as to many of the offices named in the Constitution, but it can not be said that, for this reason, the Constitutional Convention failed to create the office, or that the Legislature could, by a repeal of the statutes since passed fixing the duties and emoluments, abolish the offices created by the Constitution to which no duties are attached or emoluments fixed by that instrument.

The term of office in this case is changed from two to four years, the mode of selection is changed, and the incumbent is subject to removal at the will of the State geologist. As to the number of new duties to be performed or new burdens imposed which would be necessary to make a new office, we do not deem it necessary to inquire, as the Legislature has determined that those imposed in this case are sufficient for that purpose. With that determination we have no right or power to interfere provided the act is otherwise valid.

And this brings us to a consideration of the question as to whether the General Assembly may confer upon the State geologist the power to fill the office in question by appointment.

It is earnestly contended by the appellant that the General Assembly possesses no such power, and in support of his contention he relies principally upon the case of *State, ex rel., v. Hyde*, 121 Ind. 20.

That was an action commenced by the State, *ex rel.* Yancey, against Hyde, to determine the right to the office of chief of the division of mineral oils. Each of the parties claimed the office under an appointment made by the director of the department of geology and natural resources of the State of

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Indiana. Mr. Collett, from whom Yancey received his appointment, had been appointed and commissioned by the Governor, while Mr. Gorby, from whom Hyde received his appointment, had been elected by the General Assembly. The question at issue was as to which, if either, of the two claimants, was entitled to the office. This incidentally involved the question of the power of the General Assembly to create and fill, by its own election, the office of director of the department of geology and natural resources, and the question of the power of that officer to appoint the chief of the division of mineral oils. It was held: *First.* That the General Assembly did not possess the power, under our Constitution, to create and fill, by its own election, the office of director of the department of geology and natural resources, and, *Second.* That such officer had no power to fill, by appointment, the office of chief of the division of mineral oils.

Whatever difference of opinion existed among the members of the court, as then constituted, as to the power of the General Assembly to create and fill an office, in nowise connected with its legislative duties, there was no division of opinion as to the unconstitutionality of so much of the law then under consideration as attempted to confer on the director of the department of geology and natural resources the power to appoint the chief of the division of mineral oils. The reasons for holding this provision unconstitutional were fully set forth in the dissenting opinion filed, at the time, by ELLIOTT, C. J.

The conclusion reached that there was no valid act of the Legislature attempting to confer on the director of the department of geology and natural resources the power to appoint the chief of division of mineral oils, it must be plain to every one that the question as to whether the Legislature could or could not confer such power was not involved in the case. The conclusion that the power to fill the office

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then in controversy resided in the Governor was correct, whether section 5152, R. S. 1881, was to be regarded as in force, or whether it was to be regarded as having been repealed by subsequent legislation, for, if in force, it expressly conferred such power on the Governor, and if repealed there was an absence of statutory provisions upon the subject; and it became the duty of the Governor to fill the office, under his constitutional duty to see that the laws were faithfully executed. The laws upon the subject of inspecting oils could not be executed without an officer to execute them; and if the office was vacant it was the duty of the Governor, in the absence of some other mode prescribed by law, to fill it by appointment. As to whether the argument of the learned judge who wrote the opinion in the case of *State, ex rel. Yancey, v. Hyde*, is sound, or otherwise, we do not stop to inquire for the reason that the conclusion reached, holding that the power to appoint to the office then in controversy belonged to the Governor, was so clearly right that the process of reasoning by which the conclusion was reached is wholly immaterial. The argument of the judge who writes an opinion is never to be confounded with the principle of law decided by the court.

In the later case of *State, ex rel., v. Gorby*, 122 Ind. 17, Mr. Gorby claimed the office of director of the department of geology and natural resources by virtue of an election by the General Assembly; while Mr. Collett claimed the same office under an appointment made by the Governor of the State. The case involved the question as to whether the General Assembly of the State had the power, under our Constitution, to create an office in nowise connected with its legislative duties, and reserve to itself the right to fill such office by its own election. It was sought by Mr. Gorby to sustain the action of the General Assembly under the provisions of section 1, article 15, of our State Constitution, which reads as follows:

"All officers whose appointments are not otherwise pro-

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vided for in this Constitution shall be chosen in such manner as now is, or hereafter may be, prescribed by law." It was held that this provision conferred upon the General Assembly the power to provide the manner in which certain State officers might be chosen, but that there was a broad distinction between providing the manner in which an officer might be chosen and in making the choice.

In reaching this conclusion the court relied, in some degree, upon the case of *State, ex rel., v. Kennon*, 7 Ohio St. 546, in which it is said that the distinction between the power to direct the *manner*, the *mode* of doing an act, and doing the act itself, is almost too clear to admit of demonstration. Assuming that the office then in question was an administrative State office, the incumbent of which was charged with the duty of administering a department of the State government, it was further held that such incumbent, under our Constitution, should be elected by the people, and that it was the duty of the Governor of the State to fill such office by appointment until an election could be held. Having reached this conclusion, it was, perhaps, unnecessary to a decision of the cause, that anything more should have been said, but it was thought necessary to a proper understanding of the opinion delivered that some of the officers contemplated by that section of the Constitution should be named.

In that case it was said by the court in relation to offices of the nature of the one now under consideration: "In the creation of these, and kindred offices, it is within the power of the General Assembly to provide by law that such offices may be filled either by election or by appointment; and when to be filled by appointment it need not provide that such appointment shall be made by the Governor. Such appointments, if the law so provides, could doubtless be made by the Governor of the State, or by any one or more of the administrative State officers."

What was said of officers other than the one involved in the case, being beyond the actual controversy between the

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parties to the suit, was, of course, of no binding force, but it is of value, as it tends to index the mind of the court, in a matter illustrative of the actual adjudication. In this case, however, we are met squarely with the question as to whether the General Assembly possesses the power to confer on the State geologist the legal right to appoint to the office involved in this suit. If it possesses such power the judgment of the circuit court must be affirmed, otherwise it must be reversed.

The solution of the question presented for decision depends upon the nature of the office and the construction to be placed upon this provision of our State Constitution.

The office is not an administrative State office, whose incumbent is charged with the administration of a separate department of the State government. The duties to be performed are such as pertain purely to the police. It is an office, therefore, which may be filled by appointment, and as the appointment of the incumbent is not provided for in the Constitution, the case falls clearly within the provisions of section 1, article 15. That section applies to such officers only as may be appointed, and for whose appointment no provision is made in the Constitution. As the incumbent of the office in question may be appointed, and as no provision is made in the Constitution for his appointment, the General Assembly has the power to provide by law for the manner of his selection. It has the power to provide that such office shall be filled by popular election, or that it shall be filled by appointment. While the appointment to office is, generally, the exercise of an executive or administrative function, we do not think it must, of necessity, be made by the Chief Executive, for by the terms of section 1, article 3, of the Constitution, the executive department of the State includes the administrative. Of course it was not the intention that any administrative State officer should perform any duty properly and necessarily belonging to the Governor of the State, but it was, we think, the intention that such of-

The State, ex rel. Yancey, v. Hyde.

ficers should have the power to perform such duties as should be required of them by law, in the administration of the State government, where such requirement in no wise conflicted with the powers delegated to the Governor alone.

The appointment to office being generally the exercise of an executive or administrative function, the power must be conferred upon some executive or administrative officer, but the State geologist is an administrative State officer, elected by the people.

The appointment to the office in controversy here by the State geologist is certainly a manner or mode of selecting an officer for whose appointment no provision is made by our Constitution. Nor does such mode of selection in any manner infringe upon the prerogatives of the Governor of the State.

There are many appointments conferred by the Constitution upon the Governor which can, in no manner, be affected by legislation. The rule upon that subject is stated by Judge Cooley, in his valuable work on Constitutional Limitations, as follows: "The authority that makes the laws has large discretion in determining the means through which they shall be executed; and the performance of many duties which they may provide for by law they may refer either to the Chief Executive of the State, or, at their option, to any other executive or ministerial officer, or even to a person specially named for the duty. What can be definitely said on this subject is this: that such powers as are specially conferred by the Constitution upon the Governor, or upon any other specified officer, the Legislature can not require or authorize to be performed by any other officer or authority; and from those duties which the Constitution requires of him he can not be excused by law. But other powers or duties the executive can not exercise or assume except by legislative authority, and the power which in its discretion it confers it may also in its discretion withhold, or confide

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to other hands." Cooley Constitutional Limitations (6th ed.), 133.

The office involved in this controversy does not belong to the class which must of necessity be filled by the Governor, but it is an office created by statute, largely under the control of the Legislature which created it, and falls within the constitutional provision which confers upon the General Assembly the power to prescribe the mode or manner of selecting its incumbent.

In our opinion the statute now under consideration is not subject to the constitutional objections urged against it, and for that reason the circuit court did not err in sustaining the demurrer to the information in this cause.

Judgment affirmed.

Filed June 18, 1891; petition for a rehearing overruled Oct. 13, 1891.

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No. 14,653.

STONEHILL, EXECUTOR, ET AL. v. SWARTZ ET AL.

TRUST.—*Enforcement of.*—*Volunteer.*—*Parol Evidence Inadmissible to Establish Express Trust.*—In an action to enforce a trust in land, the plaintiff, who has parted with nothing, can not show by parol that a grantor conveying land by a deed absolute had an oral agreement with the grantee that the latter should have a life-estate in the land, and hold the remainder in trust for said plaintiff.

SAME.—*Parol Evidence.*—An express trust can not be established by parol evidence.

SAME.—*Action to Enforce.*—*Statute of Limitations.*—Where a trustee, ignoring an alleged trust, sells and mortgages the trust lands as his own, and disposes of the same by will, without remonstrance from the *cestui que trust*, the latter can not, after more than twenty years have elapsed, bring an action to enforce a trust in such lands.

QUIETING TITLE.—*Statute of Limitations.*—An action to quiet title is barred in fifteen years.

From the Newton Circuit Court.

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J. S. Saunderson, F. A. Comparet, E. P. Hammond and W. B. Austin, for appellants.

S. P. Thompson, for appellees.

OLDS, J.—The appellees, Sarah C. Swartz and Julia A. Knouff, brought this suit in the court below, against the appellants and their co-appellees, to establish and enforce an alleged trust in certain real estate situate in Newton county, Indiana, to which John Sell had the legal title, and had been in possession of for more than twenty years prior to his death, and asking to have their title to the same quieted. The complaint was in three paragraphs. Demurrers were sustained to the second and third, and overruled as to the first. Appellants answered in ten paragraphs,—the first a general denial, and the others were affirmative answers, pleading the statute of frauds of Ohio against the verbal contract between Jacob and John Sell, whereby an alleged trust was created, setting up the fifteen years' statute of limitations against part of the complaint which sought to enforce the trust against the lands situate in Indiana, and sold by the deceased in his lifetime, pleading an estoppel against the recovery for the lands sold by the executor, and setting up an election by appellees to take under the will, and also a family settlement whereby they were estopped from asserting the claims set forth in their complaint. A demurrer was sustained as to the second paragraph of answer.

The plaintiffs below filed a reply in four paragraphs.

There was a trial by the court, and a special finding of facts and conclusions of law stated by the court, to which conclusions of law appellants jointly and severally excepted. Exceptions were also reserved to the rulings of the court on demurrers.

Motions were made by the appellants to require the court to restate its conclusions of law, for judgment in their favor on facts found, for a new trial, for *venire de novo*, and in arrest of judgment; all of which motions were overruled and

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exceptions reserved. Errors are properly assigned on the several rulings of the court.

The principal discussion by counsel for the appellants relates to the sufficiency of the facts found to sustain the conclusions of law stated by the court, and the judgment rendered in pursuance therewith.

So much of the finding of facts as are material for the decision of the case are as follows:

"1. That said decedent, John Sell, was married twice. His first wife, Lydia Sell, to whom he was married about 1835, was the daughter of Jacob Sell, of Adams county, Pennsylvania. Said Lydia died about 1848, leaving surviving her her said husband John Sell, and three children by said John Sell, to wit: The plaintiff, Sarah C., who was married to John H. Swartz in 1860, and divorced from him in 1874; also the plaintiff Julia A., who is the wife of John Knouff; and also Susan, who died in 1858, at the age of about eleven years. Said Sarah C. Swartz was born in 1837. Said Julia A. Knouff was born in 1842. The second wife of said decedent, John Sell, was the defendant Elizabeth Sell, to whom he was married about 1848, and who is the widow of said decedent, her age, at this time, being 74 years. The children of said John Sell, by his second wife, are the defendants, Mary J., who is the wife of the defendant Philip Stonehill, and Emma R., who is the wife of the defendant Alexander G. Geizelman. Said Mary J. was born in 1849. Said Emma R. was born in 1853. The defendants Clara and Sherman Swartz, and Lilly Maloney, married to the defendant George Maloney, are children of the plaintiff Sarah C. Swartz by said John H. Swartz. Said Jacob Sell, the father of said John Sell's first wife Lydia, died at his residence in Adams county, Pennsylvania, in 1855. Said John Sell died in said Newton county, where he had resided over seventeen years, on the 14th day of January, 1886.

"2. Said Jacob Sell, on October 3, 1805, became the owner by patent from the United States, of the southeast

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quarter of section eleven, township eleven, range eight, in Starke county, Ohio. Soon after said John Sell, who then resided in Adams county, Pennsylvania, married said Lydia, said Jacob told said John that if he, said John, would move to Starke county, Ohio, and settle upon said land that he would some day convey the same to said Lydia, it being said Jacob's intention to convey her said land as an advancement. Said John and his wife, said Lydia, moved to and located upon said land, pursuant to said promise, and were residing there at the time of her death. Said John continued to live on said land for many years after his second marriage, making the same a home for himself and family. Said Lydia died without having received any conveyance of said land. Having failed to convey said real estate to said Lydia, and still holding the title thereto, said Jacob Sell on the 16th day of October, 1854, conveyed said real estate by deed, with full covenants of title, to said John Sell, his heirs and assigns forever."

"The consideration expressed in said deed was twenty-one hundred dollars, but nothing in fact was paid by said John to said Jacob for said real estate, the conveyance being made to him from the fact of said Jacob's intention to have conveyed said real estate to said Lydia as an advancement, and it being conveyed to said John because of said Jacob's failure to convey to said Lydia during her lifetime.

"3. At the time of executing said deed said John, who, with his family, had been residing on said land many years, was on a visit to Adams county, Pennsylvania. Said Jacob said to him: 'John, you go back to Starke county, Ohio, and improve that land' (referring to the land described in said deed) 'for your own convenience and comfort. Lydia' (referring to said John's deceased wife) 'always spoke well of you. I don't want to deprive you of a home. I will give you that land with the understanding that you are to have the use of it during your life, and at your death it is to go to Lydia's children' (referring to said plaintiffs and

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to their said sister Susan). Said John then verbally agreed with said Jacob to accept a conveyance of said real estate upon said conditions, and said deed was then executed; the said contemporaneous verbal understanding, between said Jacob and said John, being that said John was to have an estate in said land during his (said John's) life, and that at his death, said real estate should go to the children of said Lydia. There was nothing said as to what was to be done to effectuate a conveyance of said real estate to said children at said John's death, except that said John was to see that Lydia's children got the land at his death. There was no writing whatever pertaining to said verbal understanding. Prior to said transaction, said Jacob had executed a will devising said real estate to said Lydia's children, but upon said John agreeing to accept said conveyance upon said verbal conditions, and at the time of executing said deed, said Jacob destroyed said will. Said John remained on said land for many years after the execution of said deed to him by said Jacob, making it a home for himself and family. His said family, at the time of said conveyance, consisted of his three children by his first marriage, his second wife, and his said two children by his second wife, all of whom were residing with him upon said land.

"On February 3d, 1865, said John Sell and his wife, said Elizabeth Sell, conveyed by warranty deed to Mary Bard, wife of Samuel Bard, said real estate in Starke county, Ohio, except seventeen and $\frac{30}{100}$ acres, previously conveyed to other persons, which deed to said Mary Bard was duly recorded on October 20th, 1865. The consideration as expressed in said deed was ten thousand dollars.

"On October 11th, 1864, said Samuel Bard conveyed to said John Sell, by quitclaim deed, the following real estate in Newton county, Indiana, to wit: That fraction lying on the south side of the Iroquois river of S. E. qr. of S. E. qr., sec. 25, containing five and $\frac{80}{100}$ acres; also the fraction lying on the south side of said river in S. W. qr. of S. E. qr., sec. 25, con-

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taining two acres; all in township 28, range 9. October 11th, 1864, said Samuel Bard and wife conveyed to John Sell, by warranty deed, the following real estate in said county of Newton, to wit: The S. E. qr. of the N. E. qr., sec. 36; lot one (1) of said section in township 28, range 9, also E. $\frac{1}{2}$ of S. W. qr. and N. W. qr. of S. E. qr. of sec. 19, and N. W. qr. of sec. 31, and S. part of S. W. qr. of sec. 30, being all that part lying south of Iroquois river, all in township 28 north, of range 8 west, containing 340 acres. Both of said deeds were duly recorded. The consideration as expressed in the first of said deeds from said Bard and wife was \$168. The consideration as expressed in the second of said deeds was \$7,200. Said deeds were in fact executed by said Bard and wife to said John Sell in a trade for said real estate in Ohio. In said trade said land in Ohio was estimated as being of the value of twenty-six hundred and thirty-two dollars more than said land in Newton county, Indiana, and in payment of this amount, and also in consideration of the further sum of \$1,168 which said John Sell paid to said Bard, said Bard and his wife, on February 10th, 1865, conveyed by warranty deed to said John Sell the following real estate in Newton county, to wit: N. E. qr. of sec. 24, township 28, range 9; W. $\frac{1}{2}$ of N. W. qr., sec. 19, township 28, range 8, also part of S. W. qr. sec. 29, township 28, range 8, bounded as follows: Beginning on south line of said quarter section, 15 rods east of S. W. corner thereof; thence east 20 rods, thence north to north line of said qr.; thence W. 20 rods; thence south to place of beginning, containing in all 240 acres. All of said deeds from said Bard and wife to said John Sell were duly recorded on March 4th, 1865. Of lands conveyed by said Bard and wife to said Sell, the latter afterwards conveyed by deed, in which his wife, Elizabeth, joined, to persons and at prices as follows, to wit:

"On October 3d, 1870, to Orlando Bush, the E. $\frac{1}{2}$ of S. W. qr., sec. 19, township 28, range 8, and N. W. qr. of S. E. qr., sec. 19, township 28, range 8, at and for the sum of \$1,800,

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which was paid to said Sell at the date of said conveyance ; March 22d, 1883, to Wilson P. Griggs, part of S. W. qr., sec. 29, township 28, range 8, for \$300, which was paid to said Sell on said day.

"In addition to the lands conveyed to decedent by said Bard and undisposed of, said John Sell at the time of his death, on January 14th, 1886, also owned in fee simple in said county of Newton and State of Indiana, 753 acres of other real estate, making in all, with said land conveyed to decedent by said Bard and undisposed of, 1,270 acres, which, at the time of said decedent's death, was of the average value of \$30 per acre, making the total value of thirty-eight thousand and one hundred dollars.

"The personal property of said decedent at the time of his death, was of the value of \$287.50. On May 6th, 1857, the S. E. $\frac{1}{4}$, sec. 15, township 19, range 7, in Starke county, O., was conveyed to said John Sell by Frederick Fainot for the consideration as expressed in the deed of seven thousand dollars, and on March 30th, 1868, said Sell conveyed the same land to Henry C. Wise for the consideration as expressed in the deed of eleven thousand dollars.

"At the time of said decedent's death there were mortgages upon said real estate in said county of Newton, duly executed by him and his wife, and duly recorded, as follows, to wit :

"(a) Mortgage to Samuel A. Tolman, January 7th, 1884, on E. $\frac{1}{2}$, N.W. qr., sec. 24, township 28, range 9, and $80 \frac{73}{100}$ acres in S.W. qr., sec. 13, township 28, range 9, also $39 \frac{25}{100}$ acres in S. W. qr., sec. 30, township 28, range 8, more particularly described in the mortgage, to secure payment of note for \$2,000, executed by said John Sell.

"(b) November 1st, 1881, mortgage to Isaac Hoge on E. $\frac{1}{2}$ of S. E. qr., sec. 9, W. $\frac{1}{2}$ of S. W. qr. sec. 10 and N. $\frac{1}{2}$ of S. E. qr. and S. $\frac{1}{2}$ of N. E. qr. sec. 16, township 27, range 9, also W. half of N. W. qr. sec. 19, township 28, range 8, and the S. E. qr. of the N. E. qr. and the N. E. qr. of the S. E.

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qr. sec. 36, township 28, range 9, to secure payment of note for \$8,000, executed by said John Sell.

“(c) January 8th, 1886, mortgage to Edward Sanford on the N.W. qr. sec. 31, N. E. qr. sec. 24, the S. W. qr. of N. E. qr. sec. 36, township 28, range 8, and the W. $\frac{1}{2}$ of the S. E. qr. and lot 1 in sec. 36, township 28, range 9, to secure the payment of a note for \$5,000, executed by said John Sell. At the time of the death of said John Sell the principal of said mortgages and interest thereon to the amount of \$600, in all \$15,600, were unpaid. Said decedent at the time of his death was owing other sums to the amount of \$3,400, making his entire indebtedness \$19,000.

Said John Sell died testate on January 14, 1886. His will, which was duly executed on January 6, 1886, directed the payment of his debts, devised to his widow, the defendant Elizabeth Sell, the west half of the southwest quarter of section 10, township 27, range 9, in said county, of the value of \$3,200, and bequeathed to her such amount of his personal property as she might desire to take. Said will directed said executor to take charge of all of said decedent's estate, real and personal, not devised to the widow, to lease, rent, mortgage, or sell said real estate, and to pay off said mortgages and other debts, giving the executor twelve years in which to settle said estate. Said will also directed that as soon as said estate was settled, and all of said decedent's mortgages and debts were paid, the remainder of his estate should be equally divided into four parts, one to go to the plaintiff, Sarah C. Swartz, during her natural life, and the remainder of such part, at her death, to her children, Clara and Sherman Swartz, and Lilly Maloney; one part to the plaintiff Julia A. Knouff, and her husband John Knouff; one part to the defendants Mary J. Stonehill and Philip Stonehill, and one part to the defendants Emma R. Geizelman and Alexander G. Geizelman. Said Philip Stonehill was named in said will as the executor thereof. It was the intention of said testator that said will should apply to all of the real es-

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tate of which he died seized, including the undisposed real estate which had been conveyed to him by said Bard and wife.

"Said will was duly proved and admitted to probate before the clerk of the Newton Circuit Court, January 20th, 1886, and on said day duly recorded in the record of wills in said clerk's office. On the same day said Stonehill filed a bond as such executor to the approval of said clerk, and received from said clerk letters of administration of said estate, with the will annexed. At the following term of said Newton Circuit Court, namely, on the 22 day of February, 1886, said court duly approved the probate of said will, and also confirmed the action of said clerk in approving the bond and in issuing said letters of administration to said Philip Stonehill as such executor. Said Stonehill, as such executor, gave notice of his appointment, as required by law, on the 28th day of January, 1886, and on the 4th and 11th days of February, 1886. No proceedings have ever been instituted in any court by any person to contest the validity of said will or to set the same aside, and said Stonehill has continued to act, and is still acting, as such executor.

"At the time of, and for many years before and since the death of said decedent, said plaintiff Julia A. Knouff and her husband John Knouff, said defendants Geizelman and Geizelman and Stonehill and Stonehill resided in said county of Newton, not far from the residence of said decedent. Said plaintiff Sarah C. Swartz formerly resided in said county, but for many years has resided in Chicago, Illinois. She attended her father's funeral, and on the day thereafter, namely, on January 18th, 1886, it being her intention to go home on the following day, said will was carefully read to and in the presence and hearing of said plaintiffs and defendants Knouff, Elizabeth Sell, Stonehill and Stonehill and Geizelman and Geizelman. On the reading of said will none of said parties then expressed or manifested any dissatisfaction with said will or any of its provisions, and in a few mo-

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ments after the will was read the parties separated. Said parties then all had a general knowledge of the extent of the decedent's property, and of the fact that he was considerably in debt at the time of his death, but did not know the amount of his debts, nor the exact value of his property, nor whether there was anything due to him from others. At the time said will was read there was nothing said as to the amount of his property or his indebtedness. At the time of said decedent's death about 900 acres of real estate, including 400 acres which had been conveyed to him by said Bard and wife, were under cultivation. Said executor, on receiving his appointment, immediately took charge of all of said real estate, and rented and leased the same during the years 1886 and 1887, collected the rents therefrom, amounting to \$3 to \$4 an acre, each year, and applied the same to the payment of said decedent's debts. The plaintiffs did not in any manner object to said proceedings upon the part of said Stonehill as such executor, and have never demanded possession of any of said real estate, or the accounting to them for any of the rents and profits thereof.

"Said plaintiff, Sarah C. Swartz, in the spring of 1887, before the commencement by either of said plaintiffs of any action herein, and before either of them filed any claim against said estate, attempted to assist said Stonehill as such executor in selling real estate under said will, to pay said decedent's debts, with the view of a speedy settlement of said estate, but none of the lands they attempted to assist in selling were any portion of the Bard lands. Said defendant Knouff also, at the same time, and for the same purpose, attempted to assist said Stonehill in selling real estate under said will. Said widow, said executor, said Stonehill and Stonehill and said Geizelman and Geizelman believed from said various acts and conduct of said plaintiffs that they had elected to take under said will, and that they would not assert any claim against said decedent's estate, not given them under said will; and said widow, upon her own volition and

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at the request of said defendants, refrained until it was too late for her to do so to make her election to take under the law. Neither of said plaintiffs have in any way renounced their rights under said will, and each of them claims her rights thereunder.

"Said widow took personal property under said will to the value of fifty dollars, making with the real estate devised to her \$3,250, which she received under said will. Had she elected to take under the law, her interest in said estate would have been about thirteen thousand dollars, including the Bard land, and seven thousand dollars excluding the Bard land.

"Said decedent, during the time he held the legal title to said real estate in Starke county, Ohio, had possession of and exercised exclusive control thereover, receiving the rents and profits and paid the taxes thereon, and there is no evidence that said plaintiffs, or either of them, during the time that the title thereof was in his name, ever attempted to assert any interest therein, nor is there any evidence that there was ever any agreement between them, or either of them, and said decedent respecting said real estate. There is no evidence that said plaintiffs, or either of them, were ever consulted about, were present at, or had any knowledge of, the trade until after the said trade was made between said decedent and said Bard of said land in Ohio for said lands in said county of Newton, conveyed to said decedent by said Bard. Said decedent, on said real estate in Newton county being conveyed to him by said Bard, took immediate possession of the same, and remained in the uninterrupted possession thereof during his life, receiving the rents and profits and exercising exclusive control over the same, except as to such parts as he conveyed as aforesaid, and of this he remained in possession, and exercised control thereof until he conveyed the same, and during said time received and enjoyed the rents and profits of said real estate. There is no evidence that said plaintiffs, or either of them, during said

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decendent's life, claimed any interest in said real estate, or any of said real estate conveyed to said decendent by said Bard.

"There is evidence that said decendent, on some two occasions, a few years before his death, expressed to persons other than said plaintiffs, an intention, on account of said land in Ohio having been conveyed to him by said plaintiff's grandfather, Jacob Sell, to provide in his will that said plaintiffs should have a greater share of his estate than said defendants Emma R. Geizelman and Mary J. Stonehill. Said John Sell at various times while in possession of the Ohio land, and while in possession of the Bard lands, stated that plaintiffs should have the land, or the value of the Ohio land at his death, and after the exchange of the Ohio land for the Bard land, he made such statements in the presence of the plaintiffs.

"Said plaintiffs filed no claims against said decendent's estate until the 18th day of April, 1887, which was more than one year after the probate of said will. It was in these claims that they filed amended complaints at the February term, 1888, of this court, and which were consolidated at the present term of this court. Said plaintiffs did not until the filing of said amended complaints at the said February term, 1888, of this court, seek to recover title to any of said real estate described in their complaint.

"Since the death of said decendent said Stonehill, as such executor, has sold of said real estate conveyed by said Bard to said decendent as follows, to wit:

"(a) August 8th, 1887, to Peter Herath, W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$, sec. 24, township 28, range 9, for \$2,400. Of this sum Herath paid the executor \$1,400 in money and gave his note for \$1,000, which is still unpaid.

"(b) August, 1887, to George O. Conn, E. $\frac{1}{2}$ of N. E. $\frac{1}{4}$, sec. 24, township 28, range 9, for \$3,610. Of this amount Conn paid the executor \$2,800 in money and assumed \$400 of said

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mortgage on said land, and gave the executor his note for \$410, which is unpaid.

“(c) August 8th, 1887, to Samuel Merchant, the N. $\frac{1}{2}$ of W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 19, township 28, range 8, for \$1,050. Of this amount Merchant paid said executor \$450 in money and assumed \$600 of said mortgage on said land. The money so received by said executor for said lands was applied to the payment of said decedent's debts. Said executor has also sold other lands of said decedent to the amount of \$5,349, and has applied the money received on the same to the payment of said decedent's debts. Said plaintiffs did not object to the sale of any of said lands, nor have they ever notified said executor not to sell lands as required by said will, except by such notice as may be implied from the filing of the original and amended complaints in this cause. Said plaintiffs in November, 1886, notified said executor that they had a claim against said decedent's estate, on account of their grandfather's will, which claim the executor refused to recognize, and said it was not just. The Bard lands undisposed of are as follows, to wit: The northwest quarter of section thirty-one (31), in township twenty-eight (28), range eight (8), also the southeast quarter of the northeast quarter and lot numbered one (1) in section thirty-six (36), in township twenty-eight (28), in range nine (9), all in Newton county, in the State of Indiana.”

The court stated conclusions of law as follows:

“1st. That from October 16th, 1854, until March 10th, 1865, the testator, John Sell, held a legal title to the southeast quarter of section eleven (11), township eleven (11), range eight (8), in Starke county, Ohio, known as the Ohio lands, by a direct, continuing life trust, for his children by Lydia Sell, his first wife, to wit, for the plaintiffs as beneficiaries.

“2d. That the Bard lands, described in finding of facts, were charged with the same trust as the Ohio lands, subject to an interest in favor of the testator for eleven hundred and

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sixty-eight dollars (\$1,168), advanced by him, which said sum was fully repaid by the conveyance of the lands to Orlando Bush in the year 1870, of the value of eighteen hundred dollars (\$1,800).

"3d. That the plaintiffs' trust in the following lands, to wit, the southeast quarter of the northeast quarter and lot numbered one (1) of section thirty-six (36), in township twenty-eight north, range nine (9), and the northwest quarter of section thirty-one (31), in township twenty-eight (28) north, range eight (8) west, Newton county, Indiana, be declared, and the title to said lands be quieted in the plaintiffs.

"4th. That the plaintiffs should recover their costs herein."

It appears from the facts found that the deceased, John Sell, had a contract with his father-in-law, Jacob Sell, that if he would move on to the Ohio land with his family, and would improve it, Jacob would make a gift of the land to John's wife, and convey the same to her. John moved on the land with his wife about 1835, and lived upon the land until about 1848, when his first wife died, leaving her husband and three children the fruits of their marriage. John remarried in 1848, and continued to live upon the land until 1854, when he visited Jacob Sell in Pennsylvania, when Jacob said to him, "You go back and improve that land for your own convenience and comfort; Lydia" (the deceased wife) "always spoke well of you. I do not want to deprive you of a home. I will give you that land with the understanding that you are to have the use of it during your life, and at your death it is to go to Lydia's children." John was to see that the children got the land at his death, and he agreed verbally to accept a conveyance upon said conditions, and the deed was thus executed, Jacob conveying the land to him by deed of general warranty.

There were no conditions attached to the deed, no written contract entered into, but simply a verbal conversation between the parties to the effect that John was to have the land

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for life, and then it was to go to the children of his first wife.

If the agreement found by the court be valid and enforceable, it amounted simply to a contract that Jacob would convey the land to John and John would transfer the land to the children at his death, and, if he continued to own the land until he died, the children, if they could enforce the contract made for their benefit, would have no right of action until he died; but when the father sold the land, and put it beyond his power to comply with his contract, we think a right of action would accrue to them; for, having contracted to transfer the land to the children so they would receive it at his death, a disposition of the land, and putting himself in a position where he could not comply with the agreement, would be a breach of the contract.

But if we are in error in this, and the contract be valid, it creates an express trust, as all that can be contended in support of it is that the grantor conveyed the land to the grantee with an express agreement that he was to take the title for the benefit of the grantee's children, subject to a life-estate in himself, and the conclusion stated by the court is that he, the grantee, held the legal title by a direct continuing life trust for his children by Lydia. Admitting this, it can not be established by parol evidence. This doctrine is so well settled as to scarcely need the citation of authority.

In the case of *Columbus, etc., R. W. Co. v. Braden*, 110 Ind. 558, the court says: "It appears that the title through which appellant claims was, on the face of the deed, in M. E. Ingalls, and the appellant offered to prove that he held it in trust for its benefit. There was no error in excluding this evidence, for the offer was not to prove facts from which the law would imply a trust, but to prove by oral statements the existence of an express trust, and this, it is well settled, can not be done. Express trusts can not be established by parol."

In *Pearson v. Pearson*, 125 Ind. 341, it is said: "It has

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often been held by this court that a party who has not parted with anything of value can not be permitted to prove by parol that a purchase of land was made for his benefit or on his account." *Mohn v. Mohn*, 112 Ind. 285; *Thomas v. Merry*, 113 Ind. 83. And that is true in this case. The appellees Swartz and Knouff have parted with nothing. They seek to show that a deed made by Jacob Sell to John Sell, their father, absolute upon its face, was in fact a deed of trust, that John took the fee not for himself, as declared by the deed, but in trust for them.

It is said by the court in *Wright v. Moody*, 116 Ind. 175, that "A court of chancery will not enforce an unexecuted, imperfect trust, in favor of a volunteer." And this was said in a case very similar to the one at bar where it was contracted and was conveyed to the mother in trust for her children.

Counsel for appellees contend that the Ohio land was governed by the laws of that State, and that under the laws of that State there was a valid trust. Admit that the trust was a valid one under the laws of that State, yet the finding of facts clearly shows a disavowal of trust, and a holding of the land as the absolute owner in fee by John for more than twenty years. On February 3d, 1865, he sold and conveyed by warranty deed, to Mary Bard, all of the land that he then owned; prior to that date he had sold and conveyed 17 $\frac{80}{100}$ acres of the land to other persons. The facts clearly show a use and disposition of the land in Ohio by John Sell, in utter disregard of any trust, and that his right to do so was never even questioned. The land he received in this State he used in like manner, selling and mortgaging the same as his own, and finally disposing of the same by will. If it can be said that the Ohio land in fact belonged to the plaintiffs below, and that it was held in trust by the father for them, the most favorable aspect of the case for them is that the father used the trust property in the purchase of the Indiana land, and a trust resulted in their favor in the Indiana land.

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Yet the facts show a disavowal of any trust, and the use of the land as his own, ignoring and disavowing any trust for more than twenty years, and any claim they may have had to the land is barred by limitation before the bringing of this action. *Churchman v. City of Indianapolis*, 110 Ind. 259; *Ward v. Harvey*, 111 Ind. 471; *Newsom v. Board, etc.*, 103 Ind. 526. The parties were not under any disability which would excuse the bringing of the action.

This being an action to quiet title, it would be barred in fifteen years. *Royse v. Turnbaugh*, 117 Ind. 539.

It would seem, from the facts found, that the appellees were not at all diligent in endeavoring to enforce their rights, and they seem to have conceived the idea of enforcing their claim at a recent date. They had full knowledge of the disposition of the property by the will of their father; they acquiesce in it, and permit some of the land to be sold, and suffer the widow to accept the provisions of the will, to her detriment if their claim is enforceable; and after all this transpired they institute this suit. The conclusions of law stated by the court are erroneous, and can not be sustained. The facts found entitle the appellants to a judgment.

The judgment is reversed, with instructions to the circuit court to restate its conclusions of law, to the effect that the appellees take nothing by this action, and that appellants are entitled to recover their costs, and to render judgment in favor of the appellants, reserving to the appellees their rights under the will of John Sell, deceased.

Filed Oct. 9, 1891.

The Brazil Block Coal Company v. Hoodlet.

No. 14,793.

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NEGLIGENCE.—*Needless Exposure to Danger.*—One who needlessly and recklessly exposes himself to open and obvious danger is guilty of negligence. If he thereby suffers injury he is guilty of such negligence as will preclude a recovery against the persons causing such injury.

MASTER AND SERVANT.—*Risks Assumed by Employee.*—*Hazardous Employment.*—A servant assumes all the ordinary and usual risks of the business upon which he enters, so far as these risks are known to him, or could be readily discernible by a person of his age and capacity, in the exercise of ordinary care. This is true even though the duties of the service may be from their nature necessarily hazardous.

SAME.—*Knowledge of Defect.*—*Continuance in Service.*—*Master's Promise to Repair.*—An employee who voluntarily continues in the master's service after notice of defects in tools, machinery, or other appliances which augment the danger of his service, thereby assumes the risk as increased by the defect, unless the master expressly or impliedly promises to remedy the defect.

SAME.—*Character of Risks Assumed by Employee.*—The risks thus impliedly assumed by the employee are the usual risks fairly incident to his service, whether that service is rendered specially hazardous by the use of defective appliances or not. He does not necessarily assume all the risks incident to the business carried on by the employer, but only such as are connected with, and incidental to, his employment.

SAME.—*Risk not Contemplated in Employment.*—*Employee Acting under Orders.*—*To What Extent Protected.*—Where a master orders a servant to do something which involves encountering a risk not contemplated in his employment, although the risk is equally open to the observation of both, it does not necessarily follow that the servant either assumes the increased risk, or is negligent in obeying the order. If the apparent risk is such that a man of ordinary prudence would not take the risk, the servant acts at his peril. But unless the apparent danger is such as to deter a man of ordinary prudence from encountering it, the servant will not be compelled to abandon the service, or assume all additional risk, but may obey the order, using care in proportion to the risk apparently assumed, and if he is injured the master must respond in damages. For risk which plaintiff did not assume by reason of his employment, see opinion.

SPECIAL VERDICT.—*What it Should Contain.*—*Failure to Find upon Material Fact.*—*Effect of.*—A special verdict should contain a finding by the jury upon every material fact in issue necessary to constitute the plaintiff's cause of action or the defendant's defence upon which there is evidence.

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There need be no finding upon immaterial facts, nor upon facts presumed but not within the issues. A failure to find upon any material fact in issue is equivalent to a finding against the party upon whom the burden rests to establish such fact.

SAME.—Failure to Find upon Material Fact.—Remedy for.—Motion for New Trial.—If the special verdict fails to find material facts, within the issues, which were established by the evidence, the remedy is not by motion to coerce the jury into making such finding, but by a motion for a new trial by the party aggrieved.

From the Clay Circuit Court.

G. A. Knight and *A. W. Knight*, for appellant.

D. E. Williamson and *J. A. McNutt*, for appellee.

McBRIDE, J.—This was a suit by the appellee to recover of appellant damages for personal injuries alleged to have been sustained by falling into a coal shaft.

Aside from prefatory averments, the description of the character and extent of the injuries sustained, and the prayer, the complaint is as follows :

“ That, on the 4th day of January, 1888, and for a long time prior thereto, said defendant was in possession of and controlled and operated a certain coal mine in said county of Clay, and employed and operated a large number of employees and laborers, to wit, one hundred men ; that the mine of said company was entered by a shaft or opening of about 100 feet in depth ; that at the aforesaid date the plaintiff, being in the employment of said defendant as a blacksmith, his principal business being to shoe the mules and horses connected with the mining business of said company, to sharpen coal picks and other tools of the miners, as well as other work when required by said defendant ; that on said date, the pump in said mine being out of repair, the plaintiff was ordered by the defendant to enter said shaft and go to the bottom of said mine or shaft, 96 feet, and make repairs on said pump ; that in pursuance of such orders so given by said bank boss, he did enter said shaft and descend the same to the bottom, and when said repairs had been made and fin-

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ished, the said plaintiff was directed and ordered by the engineer in charge of the machinery and said pump to take the tools and packing used in said repairs to the engine-house on said premises of said defendant, and as was otherwise his duty to do; and he avers that in coming out of said shaft and reaching the surface of the ground at the top of the shaft, he proceeded by the usual way from the top of shaft to the tool-house for the purpose of returning the tools and packing used in the repairs of said pump; that the usual and ordinary way was along and by said shaft to the engine-house, and that in passing around the mouth of said shaft, using all necessary care and prudence, and without any fault or negligence on his part, accidentally and without negligence slipped and fell into the mouth of said shaft and to the bottom thereof, 96 feet; and that plaintiff, without negligence on his part, so fell into said shaft, and to the bottom thereof by reason of the negligence and fault of the defendant failing and neglecting to fence off and to keep enclosed the top of said shaft and the entrance thereof by vertical, flat or other gates or protection, covering and protecting the mouth of said shaft as required by law, but with full knowledge of the fact of such omissions negligently and carelessly permitted the mouth of said shaft to remain open and exposed, well knowing the dangers to its employees compelled to work therein and around and about said shaft; that at the time and place aforesaid, when and where said plaintiff fell into said shaft, he was using all the care that he possibly could passing thereby."

The first two errors assigned question the sufficiency of the complaint.

We can probably best state the objections urged to the complaint by quoting from appellant's brief. Appellant's counsel say:

"We insist, first, that this complaint shows that the danger to which appellee was exposed, namely, the unprotected mouth of the shaft, was an open and obvious one; that ap-

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pellee knew as well as appellant that it was not protected; that the fact was discoverable by him by the use of his eyes; that he could not avoid knowing it, and is conclusively presumed to know, what he might and could have observed by the use of his senses; he nowhere in his complaint avers his ignorance of the unprotected mouth of the shaft about which he was working, or that he complained of it; or that the appellant induced him to continue at work under a promise to fix it, and that appellee's complaint shows that this was a known danger which he voluntarily encountered; that it was one of the risks he voluntarily assumed under his employment, and was as well known to him as to appellant, and that, therefore, he is not entitled to recover."

They also insist that the specific averments of the complaint, tending to show that appellee was guilty of contributory negligence, are sufficient to control the general averment that the appellee was without fault.

It is too plain for controversy that one who needlessly and recklessly exposes himself to open and obvious danger is guilty of negligence. If he thereby suffers injury, he is guilty of such negligence as will preclude a recovery against the person causing such injury.

The law requires that men shall use the senses with which nature has endowed them, and when, without excuse, one fails to do so, and is injured in consequence, he alone must suffer the consequences. *Lake Shore, etc., R. W. Co. v. Pinchin*, 112 Ind. 592; *City of Plymouth v. Milner*, 117 Ind. 324.

We can not agree with appellant's counsel that such a state of facts is shown by the complaint in this case.

A much more difficult question is presented by the claim that the injury was a consequence of one of the risks which the appellee assumed under his employment.

At the time appellee received the injury the following statute was in force, and had been for several years:

"The owner or agent of every coal-mine shaft or slope, at the end of six months from the time this act takes effect,

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shall keep the top of every such shaft or slope, and the entrance thereof, securely fenced off by vertical or flat gates covering and protecting the mouth of such shaft or slope. The entrance of an abandoned shaft or slope shall be securely fenced off, so that no injury can arise therefrom. The owner or agent, or either of them, violating the provisions of this section shall be fined in any sum not exceeding one hundred dollars for each day or part of a day the same is violated." Section 5468, R. S. 1881. The complaint charges that the appellant had failed to comply with this law, and had negligently left the mouth of the shaft in question open and exposed, and that it was by reason of such alleged violation of law he was injured.

The law is well settled that a servant assumes all the ordinary and usual risks of the business upon which he enters, so far as these risks are known to him, or could be readily discernible by a person of his age and capacity, in the exercise of ordinary care. Shearman and Redfield Negl., section 185; Cooley Torts, marginal page 541, and cases cited by both authors; *Louisville, etc., R. W. Co. v. Frawley*, 110 Ind. 18; *Atlas Engine Works v. Randall*, 100 Ind. 293 (50 Am. Rep. 798); *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151.

This is true, even though the duties of the service may be from their nature necessarily hazardous. It is assumed that the servant, when he engages in the employment, does so in view of all the incidental hazards, and that he and his employer, when making their negotiations, fixing the terms and agreeing upon the compensation that shall be paid to him, must have contemplated these as having an important bearing on their stipulations.

As the servant then knows that he will be exposed to the incidental risk, he must be supposed to have contracted that, as between himself and the master, he would run this risk. Cooley Torts, *supra*; *Hutchinson v. York, etc., R. W. Co.*, 5 Exch. 343 (351).

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It is also settled law that, notwithstanding the continuing duty resting upon the master to provide for his employees suitable and safe places and appliances for their work, the employee who voluntarily continues in the master's service after notice of defects in tools, machinery, or other appliances which augment the danger of his service, thereby assumes the risk as increased by the defect, unless the master expressly or impliedly promises to remedy the defect. *Indianapolis, etc., R. W. Co. v. Watson*, 114 Ind. 20, and authorities there cited.

This rule, while in some respects a harsh one, and subject to much abuse, is within proper limits wise, and is justified by sound public policy. As a rule employers can only learn of defects in appliances furnished through the vigilance and faithfulness of their employees.

The personal interest and sense of personal responsibility which this rule casts upon the employee must certainly tend to insure better and safer service. It is also a matter in which the public are interested. As is said by Judge Cooley: "In many employments the public are compelled to rely upon the caution and diligence of servants as the chief protection against accidents which may prove destructive of life or limb; and any rule of law which would give the servant a remedy against the master for any injury resulting to himself from such an accident, instead of compelling him to rely for his protection upon his own vigilance, must necessarily tend in the direction of the abatement of his vigilance, and in the same degree to increase the hazards to others." Cooley Torts, marginal page 542.

While, as above stated, we regard the rule within proper limits as a wise and just one, we are not disposed to enlarge it; on the contrary, as it is asserted in some of the cases, it should be restricted. The rule as laid down in many cases omits the limitation growing out of the express or implied promise of the master to repair. This we can not approve. Again, in some of the cases it is said that when the defect or

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injurious contrivance is equally known to, or alike open to the observation of, both employer and employee, both are upon common ground, and the employer is not liable for resulting injury. *Louisville, etc., R. W. Co. v. Frawley, supra*; *Griffin v. Ohio, etc., R. W. Co.*, 124 Ind. 326.

If this rule is to be interpreted as broadly as its terms would seem to indicate, we can not follow it. As applied to the facts in the cases then before the court it was probably correct, but it is not true that in all such cases employer and employee are upon common ground. Nor is it the law that in all cases when an employee continues in service, knowing that some of the appliances used in the business are defective, he assumes all the risk.

When a servant enters upon an employment which he knows is hazardous, either by reason of the nature of the employment, or because of defective or otherwise dangerous appliances, he may well be said to assume this risk. Knowing when he solicits and accepts the employment that if it is given him he must use defective tools, he contracts to take that as one of the risks of the service. Whether anything is said of the dangerous character of the employment, or of the defective and dangerous appliances or not, if the dangers and defects are of such character that they are equally known to or open to the observation of both employer and employee, it can well and justly be said they stand on a common footing. Acceptance of the employment is an acceptance of the attendant risk.

The risks thus impliedly assumed by the employee are the usual risks fairly incident to his service, whether that service is rendered specially hazardous by the use of defective appliances or not. He does not necessarily assume all the risks incident to the business carried on by the employer, but only such as are connected with, and incidental to, his employment. There may be many risks connected with or growing out of the business carried on by the employer which the employee can not be said to assume. The appel-

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lee was employed as a blacksmith. His duties, as stated in the complaint were to "shoe the mules and horses connected with the mining business of said company, to sharpen coal-picks, and other tools of the miners, as well as other work when required by said defendant." His employment being as a blacksmith, the other work referred to, but not enumerated, will be presumed to have been other work as a blacksmith. All of the usual hazards incident to such employment were assumed by him when he entered the service. If, by reason of defective tools, or other appliance used in his said employment, the hazard was increased, he, by voluntarily remaining in the service without sufficient excuse, would assume the increased risk.

He did not, however, impliedly assume risks not connected with his work.

For instance, if, by reason of the master's negligence or failure to furnish proper appliances to be used by the miners in dislodging the coal in the mines, additional hazard attached to that part of the business as carried on, it could not be said that the blacksmith impliedly assumed such additional hazard, any more than it could be said that the miner, whose duty required him to delve, with pick and drill, in the mine, impliedly assumed any additional hazard caused by defective appliances around the blacksmith's forge. This is true, notwithstanding the fact that the miner's duty, or his master's command, may occasionally require him to visit the blacksmith's shop, and the blacksmith's duty or the master's command may occasionally call him into the mines. Cooley Torts, marginal page 560; *Chicago, etc., R. W. Co. v. Bayfield*, 37 Mich. 205, and cases cited.

The default of the master, which is alleged to have created the danger and caused the injury in this case, was one which would necessarily be readily apparent to any one possessed of sight.

It is charged that, in violation of an express statutory requirement, the mouth of the mine shaft was left unprotected.

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We can not say, however, that this was a danger which the appellee impliedly assumed when he entered appellant's employment. While it was a danger connected with, or growing out of, the manner in which the business was done, we can not say that it was a danger connected with his service.

It is said, however, that when he was required to descend the shaft, in order to discharge one of his duties, the danger being apparent, he assumed the risk.

The complaint avers that he did this by the express command of the appellant. But, it may be said, he need not have obeyed the command. He was free to quit the service and thus avoid the danger, and that, by voluntarily continuing in the service and obeying the command, it must be presumed that he consented to take the additional risk. While in theory the employee, whose master furnishes appliances which both know are defective, is at liberty to quit the service, and refuse to be subjected to the enhanced danger, we can not close our eyes to the fact that the necessities of the struggle for existence tend strongly to deprive the employee of that theoretical independence and freedom of action. While the service can not be compulsory in the sense that the employee can be compelled to work against his will, yet the very nature of the relation existing between the parties carries with it the irresistible inference of dependence upon the one side.

In the case of *Patterson v. Pittsburgh, etc., R. R. Co.*, 76 Pa. St. 389, it is said by the Supreme Court of Pennsylvania, speaking of *Snow v. Housatonic R. R. Co.*, 8 Allen, 441, and another case: "In both these cases, the defects, from which the accident, arose, were known to the employees, but as they were injured in the discharge of duties imposed upon them by their employers, such knowledge was adjudged not to raise a presumption of concurrent negligence. This doctrine is obviously just and proper. The servant does not stand on the same footing with the master. His primary duty is obedience, and if, when in the discharge of that duty,

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he is damaged, through the neglect of the master, it is but meet that he should be recompensed."

Judge Cooley says: "It has been often and very justly remarked that a man may decline any exceptionally dangerous employment, but if he voluntarily engages in it he should not complain because it is dangerous. Nevertheless, where one has entered upon the employment and assumed the incidental risks, it is not reasonable to hold that other risks which he is directed by the master to assume, are to be left to rest upon his shoulders, merely because he did not take upon himself the responsibility of throwing up the employment instead of obeying the order." *Cooley Torts*, marginal page 555.

In this case the appellee was ordered to go to a certain place, and do certain work. To reach the place where the work was to be done it was necessary to use the unprotected shaft. The fact of its unprotected condition was equally open to the observation of both. The appellee obeyed the order, and, while returning and walking past the mouth of the open shaft, was injured because the shaft was not protected. In our opinion the risk arising from the neglect of the appellant to provide gates for the mouth of the shaft was not one of the risks assumed by the appellee when he entered the service, and we can not say, from the averments of the complaint, that he was necessarily negligent in obeying the order. When a master orders a servant to do something which involves encountering a risk not contemplated in his employment, although the risk is equally open to the observation of both, it does not necessarily follow that the servant either assumes the increased risk, or is negligent in obeying the order. If the apparent danger is such that a man of ordinary prudence would not take the risk, the servant acts at his peril. But unless the apparent danger is such as to deter a man of ordinary prudence from encountering it, the servant will not be compelled to abandon the service, or assume all additional risk, but may obey the order, using care in proportion to the

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risk apparently assumed, and if he is injured the master must respond in damages.

It being the duty of the master to use ordinary care to provide for his employees a safe place to work, with safe tools and appliances for such work, the servant may, in such a case, assume that the master is mindful of that duty; that he has superior knowledge of the facts, and will not wantonly expose him to unnecessary peril. There are acts which are negligent *per se*, but we can not say that walking past the mouth of an open shaft is one of them. In our opinion the complaint states a good cause of action.

We are sustained in the conclusion we have reached by the following, with many other authorities: *Pennsylvania R. R. Co. v. Weber*, 76 Pa. St. 157 (18 Am. Rep. 407); *Flynn v. Kansas City, etc., R. R. Co.* 78 Mo. 195 (47 Am. Rep. 99); *Keegan v. Kavanaugh*, 62 Mo. 230; *Snow v. Housatonic R. R. Co., supra*; Cooley Torts, marginal page 555; *Green v. Minneapolis, etc., R. W. Co.*, 31 Minn. 248 (47 Am. Rep. 785); *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240 (14 Am. Rep. 598); *Colorado Central R. R. Co. v. Ogden*, 3 Colorado, 499; Wood Master and Servant, section 352; *Rogers v. Leyden*, 127 Ind. 50; *Cincinnati, etc., R. W. Co. v. Lang*, 118 Ind. 579; *Kranz v. Long Island R. W. Co.*, 123 N. Y. 1; Cooley Torts, marginal page 560; *Taylor v. Evansville, etc., R. R. Co.*, 121 Ind. 124; *Lake Shore, etc., R. W. Co. v. McCormick*, 74 Ind. 440; *Boyce v. Fitzpatrick*, 80 Ind. 526; Wood Master and Servant, section 435; *Pennsylvania Co. v. O'Shaughnessy*, 122 Ind. 588.

Appellant assigns as error the action of the court in sustaining a demurrer to the second paragraph of its answer. The paragraph in question is assumed to be affirmative in its character, and to show that the appellee voluntarily assumed the risks occasioned by the ungarded condition of the shaft. Counsel cite *Louisville, etc., R. R. Co. v. Orr*, 84

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Ind. 50, and insist that it is precisely such an answer as was held good in that case.

We do not deem it necessary to add to the length of this opinion by copying the answer. It is enough to say that it is based on the assumption that the implied risks assumed by the appellee when he entered the service of the appellant embraced those connected with the use of the shaft, and that continuing in the service with knowledge of that which would cause an increase of hazard in the use of the shaft would evidence an assumption also of such increased hazard.

As we have heretofore shown, the appellee only impliedly assumed those risks incident to that part of appellant's business with which he was connected—the usual and ordinary risks connected with his own service. The court did not err in this ruling.

The jury returned a special verdict. At the proper time the appellant objected to the reception of the verdict and discharge of the jury, and moved that they be required to return to their room and make their verdict more full, by finding upon several matters which it was claimed were omitted, and upon which appellant insisted the jury ought to find. The motion specifies fifteen particulars in which it is claimed the verdict is defective.

A special verdict should contain a finding by the jury upon every material fact in issue necessary to constitute the plaintiff's cause of action or the defendant's defence upon which there is evidence. Works Practice, section 851, and cases cited.

There need be no finding upon immaterial facts, nor upon facts proven but not within the issues. *Johnson v. Putnam*, 95 Ind. 57.

A failure to find upon any material fact in issue is equivalent to a finding against the party upon whom the burthen rests to establish such fact. *Henderson v. Dickey*, 76 Ind. 264; *Jones v. Baird*, 76 Ind. 164; *Parmater v. State, ex rel.*,

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102 Ind. 90 ; *Johnson v. Putnam*, *supra* ; *Glantz v. City of South Bend*, 106 Ind. 305.

If the special verdict fails to find material facts, within the issues, which were established by the evidence, the remedy is not by motion to coerce them into making such finding, but by a motion for a new trial by the party aggrieved. *Vinton v. Baldwin*, 95 Ind. 433 ; *Jones v. Baird*, *supra* ; *Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582 ; *City of Lafayette v. Allen*, 81 Ind. 166.

The court, therefore, did not err in overruling this motion. The jury are exclusive judges of all questions of fact. The court can instruct them as to the law, but can not dictate to them what facts they shall, or shall not, find except in a case where there is no conflicting evidence. On all controverted facts, for the court to say to the jury that they shall find that such facts exist would be a clear usurpation by the court of the functions of the jury.

The court can not coerce the jury into making a finding.

The fifth alleged error is waived.

The sixth, seventh and eighth challenge the action of the court in overruling appellant's motion for a judgment in its favor on the special verdict, and in sustaining a similar motion by the appellee.

No good purpose would be subserved by copying the special verdict into the record. It is long, and finds fully upon every material fact within the issue. The principal objections urged to the verdict are like those urged to the complaint—that they show that the absence of gates from the mouth of the shaft was not only obvious to all, but that appellee had actual knowledge of such condition, had several times passed up and down said shaft, and had at one time, by direction of appellant's officer in charge of said mine, assisted in placing bars at the mouth of the mine as a substitute for gates, and that he was guilty of contributory negligence.

We think the verdict amply sustained the action of the

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court. It is unnecessary to state our reasons further than to say that the reasons which led us to reach the conclusion we did as to the sufficiency of the complaint impel us to sustain the judgment.

The only additional question raised is on the motion for a new trial, urging that the evidence does not sustain the verdict. We think it does sustain the verdict in every particular. In conclusion we feel that it is only just to appellant's counsel to say that the case has been argued by them with signal ability, and that the failure of appellant to recover is not for want of an able and exhaustive presentation of the case by them.

Judgment affirmed, with costs.

COFFEY, J., took no part in the decision of this cause.

Filed May 26, 1891; petition for a rehearing overruled Oct. 14, 1891.

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COUNTY COMMISSIONERS.—*Establishment of Highway.—Plea in Abatement.*—

In a proceeding before a board of county commissioners to lay out and establish a public highway, it was not error to strike from the files a plea in abatement, in which it was alleged that less than six of the persons signing the petition resided in the immediate neighborhood of the proposed highway. If the party filing the plea possessed the right to appear and contest the jurisdictional fact set up in his plea, he had that right without the filing of any pleading whatever. In such a proceeding the question of jurisdiction can not be made an adversary one. As the plea was improperly filed with the board of commissioners, it was not error for the circuit court to refuse to allow it to be refiled.

AMICUS CURIAE.—*What His Rights are.*—An *amicus curiae* may appear, and, with the permission of the court, introduce evidence for his own benefit, but he can not except to any ruling made by the court, as he has no right to complain if the court refuses to accept his suggestion.

From the Johnson Circuit Court.

S. Stansifer and *C. S. Baker*, for appellant.

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COFFEY, C. J.—This was a proceeding by the appellees before the board of commissioners of Bartholomew county to lay out and establish a public highway. At the time the petition was filed Joseph I. Irwin appeared and filed what he called a plea in abatement, in which it was alleged that of the persons signing the petition less than six resided in the immediate neighborhood of the proposed highway.

The board of commissioners, on motion of the petitioners, struck out the plea, on the ground that Irwin was not a party to the proceeding, and had no interest therein. The board then heard the proof, and, after a formal finding of all the jurisdictional facts, appointed viewers. Remonstrances were afterwards filed, and such proceedings had as resulted in an order establishing the highway, from which the remonstrators appealed to the Bartholomew Circuit Court.

In the circuit court Irwin again appeared, and offered to refile his plea in abatement, which offer was resisted by the petitioners, on the ground assumed by the board of commissioners in striking it out, and upon the further ground that he had not appealed. The court refused to allow him to refile his plea, and he excepted.

The cause was venued to the Johnson Circuit Court, where a trial resulted in an order and judgment establishing the highway.

Irwin alone appeals to this court, and assigns as error the action of the circuit court in refusing him permission to refile his plea in abatement.

No brief in the case on behalf of the appellee is filed here.

The board of commissioners did not err, in our opinion, in striking out the appellant's plea in abatement.

If he possessed the right to appear and contest the jurisdictional fact set up in his plea, he had that right without the filing of any pleading whatever. *Little v. Thompson*, 24 Ind. 146.

But there could be no adverse proceedings in the cause, save as the question of the sufficiency of the petition was in-

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volved, and the questions of public utility and damages sustained by those over whose land the highway might be established. *Wright v. Wells*, 29 Ind. 354; *Green v. Elliott*, 86 Ind. 53.

As the appellant sought to make the question of jurisdiction adversary, and to encumber the record with an unnecessary pleading, the board of commissioners very properly struck out the written plea.

As the plea was improperly filed with the board of commissioners, we think the circuit court did not err in refusing to allow it to be refiled.

There was no offer to prove the fact alleged in the plea on the trial in the circuit court, or at any other time when the cause was called for investigation, but the record of the board of commissioners does disclose the fact that it was expressly found from the evidence that six of the petitioners did reside in the immediate neighborhood of the proposed highway. Whether appellant took part in the trial of that question before the board does not appear. Had he offered in the circuit court to prove the facts set up in his plea, and the evidence had been rejected, we would have a different question before us from the one presented.

The case before us is one where a party complains of the action of the court in refusing to permit him to file an improper and unnecessary pleading. In the refusal to allow this to be done we do not think the court erred.

For still another reason we are of the opinion that the judgment of the circuit court should not be reversed on this appeal. Irwin was not a party to the proceeding, and had no direct interest in its result. He could only appear as an *amicus curiæ*, and as such could take no exception to the ruling of the court. *Campbell v. Swasey*, 12 Ind. 70; *Hust v. Conn*, 12 Ind. 257.

An *amicus curiæ* may appear, and, with the permission of the court, introduce evidence for his own benefit, but he can not except to any ruling made by the court, as he has no right

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to complain if the court refuses to accept his suggestions. *Bass v. Fontleroy*, 11 Texas, 698.

None of the parties to the controversy are here complaining of any error of the court during the progress of the proceeding.

As the parties immediately interested are content with the result reached, the judgment should not be reversed at the suggestion of a third party, who is not directly affected by the final decree.

Judgment affirmed.

Filed Oct. 16, 1891.

No. 14,833.

MULL ET AL. v. BOWLES.

RESULTING TRUST.—Evidence Establishing.—Quieting Title.—When a resulting trust in land is claimed, and the evidence, while it does not show an express contract between the parties, does show that the relation of principal and agent existed between them, and that the land was purchased by the agent in the absence of the principal, and with her money, it is sufficient to create a resulting trust under the provisions of section 2976, R. S. 1881, and upon the death of the agent, the trust being terminated thereby, the principal is entitled to have her title to the land quieted.

From the Rush Circuit Court.

B. L. Smith, W. J. Henley and F. J. Hall, for appellants.

W. A. Cullen, for appellee.

MILLER, J.—This action was brought by the appellee, Mary B. Bowles, against the appellants, who are her brothers and mother, to declare a trust and quiet her title to a tract of land. The complaint, which is in several paragraphs, avers that the property was purchased by her father, George Mull, Sr., in his lifetime, as her agent, and with her money.

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The only material difference in the paragraphs is that in some of them it is charged that her father took the title to the land in his own name, in pursuance of an agreement with her to hold the same in trust for her ; and by others that he took the title in his own name without her knowledge or consent.

A number of the heirs filed disclaimers ; the others answered the complaint by a general denial.

A trial by the court resulted in a finding and judgment for the plaintiff.

The case is before us on the evidence, all other questions being waived by the failure of counsel to discuss them in their briefs.

There was evidence on the trial tending to show that in the year 1860 George Mull, Sr., conveyed to the appellee, then Mary B. Mull, a tract of land in Fulton county, as an advancement, in the sum of \$1,200 ; that this land was held by her until sometime in the fall of 1882, when it was sold for \$3,000 ; that she also received other advancements from her father, made to equalize advancements made to his other children ; and that her father took her into partnership in running the farm on which they lived, from which partnership she received as her share of the profits an amount which, added to the other sums, gave her at the time the land in dispute was purchased a capital of about \$6,000.

The evidence shows, without contradiction, that her father, during the whole period of time from 1860 down to the purchase of the land in 1882, acted as her agent in the management of her business affairs, such as loaning and collecting her money, entering satisfaction of mortgages, executed to her, in the mortgage records of the county ; that prior to the purchase of the land in controversy, he called in several of her loans, stating at the time that he was doing so for the purpose of investing the money in land for her ; that in the fall of 1882 he looked at several tracts of land, stating at the time that he wanted to make a purchase of land

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for the plaintiff, and with her money in his hands; that at the time he bought the land, the title to which is in dispute, and prior and subsequent to that time, he stated to a large number of his neighbors, and to several members of his family, that he was purchasing the land with her money, and for her. These statements are not contradicted, but are in many respects corroborated by other evidence.

We are satisfied that the court was justified in finding that the land was purchased with her money, for her use and benefit, by her father acting as her agent.

It is claimed that the evidence fails to show any contract, or agreement, express or implied, between the appellee and her father, by which he agreed to hold the land in trust for her.

The trust relied upon in this action was of the class known as resulting trusts; such as are not only created by the express declaration of the parties, but also by virtue of a trust raised and created by implication of law.

"Trusts of this description are either implied, or presumed from the supposed intention of the parties, and the nature of the transaction; when they are known as 'resulting or presumptive trusts;' or they are raised independently of any such intention, and forced on the conscience of the trustee by equitable construction, and the operation of law; and such may be distinguished as 'constructive trusts.'" Hill Trustees, section 91.

While the evidence does not show an express contract between the parties, it does show that the relation of principal and agent existed between them, and that the land was purchased by the agent, in the absence of the principal, and with her money. This is sufficient to create a resulting trust under the provisions of section 2976, R. S. 1881. *Mitchell v. Colglazier*, 106 Ind. 464; *Riehl v. Evansville, etc., Ass'n*, 104 Ind. 70; *Ray v. Ferrell*, 127 Ind. 570.

If the agent, John Mull, Sr., took the title to the land in his own name, without the knowledge and consent of the

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appellee, it would come within the first clause of the section cited, creating a trust where the " alienee shall have taken an absolute conveyance in his own name without the consent of the person with whose money the consideration was paid."

We are, however, of the opinion that the declarations of the ancestor were sufficient, when taken in connection with the other facts, to justify the court in holding that there was an agreement between the parties, made without fraudulent intent, that George Mull, Sr., was to take and hold the title to the land for the use and benefit of the appellee.

The death of the father having terminated the trust, she was entitled to have her title to the land quieted and set at rest.

Judgment affirmed.

Filed October 15, 1891.

No. 14,873.

WARBRITTON v. DEMORETT ET AL.

DEED.—*Mistake in Description.*—*Legal and Equitable Title.*—Where a certain tract of land was sold to A., but by a mistake in the description the deed did not convey all the land purchased, but A. was put in possession of the land intended to be conveyed, and made valuable and lasting improvements thereon, one who thereafter purchased the land omitted by mistake from the deed, with notice of the equitable title of A., took the legal title to the land, subject to such equitable title.

REAL ESTATE.—*Action to Recover.*—*Counter-Claim to Quiet Title.*—*Parties Defendant Thereto.*—In a suit to recover the possession of real estate, where a counter-claim is filed by the defendants to quiet the title to the land in dispute, it is not necessary that the grantors of the defendants should be made parties defendant thereto.

SAME.—*Conveyance of Bordering on Highway.*—*What Passes.*—The conveyance of land bordering on a public highway, as a general rule, conveys title to the center of the highway whether so expressed in the deed or not.

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| 137 | 157 |
| 139 | 362 |

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PLEADING.—General Allegations.—When Specific Allegations Control.—General allegations in a pleading are controlled by specific allegations, but in order to control the general allegations they must be clearly repugnant thereto, and must show that the general allegations are untrue.

From the Montgomery Circuit Court.

L. J. Coppage, for appellant.

M. E. Clodfelter and *G. D. Hurley*, for appellees.

COFFEY, J.—This was an action by the appellant against the appellees to recover the possession of the real estate described in the complaint.

In addition to the general denial, the appellees answered that one Watkins, being the owner of a certain described tract of land in Montgomery county, Indiana, sold the portion thereof described in the complaint to one Jessup, and placed him in the possession thereof; that in attempting to convey said land by deed to the said Jessup, a mistake occurred in the description, by reason of which said deed did not cover all the land purchased; that subsequent sales and conveyances were made from the said Jessup to persons named until the appellees became the owners of said land; that the persons through whom the appellees make their title each purchased the whole of the land described in the complaint, and each was put into the actual possession of the whole thereof, and made valuable and lasting improvements thereon, but that the mistake in the description runs through all the conveyances; that each of said conveyances was duly recorded; that subsequent to the sale and conveyance to the said Jessup, Watkins sold and conveyed the remainder of the land so owned by him to the appellant, who at the time of his purchase had full knowledge of the fact that Watkins had sold to Jessup, and attempted to convey, the land described in the complaint; that the grantees of the said Jessup were in the actual possession of the land in controversy at the time the appellant made his purchase from the said Watkins.

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The appellees also filed a counter-claim, in which they set up substantially the same facts averred in the second paragraph of their answer, and prayed that their title to the land might be quieted.

The court overruled a demurrer to the second paragraph of the answer and also to the counter-claim.

A trial of the cause, by jury, resulted in a verdict for the appellees, upon which the court, over a motion for a new trial, rendered judgment.

The assignment of errors calls in question the correctness of the ruling of the circuit court in overruling the demurrer to the second paragraph of the answer, in overruling the demurrer to the counter-claim, and in overruling the appellant's motion for a new trial.

As the questions presented by overruling the demurrer to the second paragraph of the answer and in overruling the demurrer to the counter-claim are substantially the same, they may with propriety be considered together.

In our opinion the court did not err in overruling either of said demurrers. Each of the demurrers admits that Watkins sold the land in controversy to Jessup, and placed him in possession of the same; that Watkins undertook to convey the land, but by mutual mistake it was incorrectly described; that Jessup and his grantees have ever since been in the actual possession of the land, and have made lasting and valuable improvements thereon; and that the appellant, at the time of his purchase, had full knowledge of the sale so made by Watkins.

The sale by Watkins to Jessup, followed by the delivery of possession and valuable and lasting improvements, vested the equitable title in Jessup, and the appellant having purchased with notice of such equitable title, took the legal title subject thereto. *Indiana, etc., R. W. Co. v. McBroom*, 114 Ind. 198; *Barnes v. Union School Tp.*, 91 Ind. 301; *Smith v. Kyler*, 74 Ind. 575.

It is urged, however, that the counter-claim seeks a cor-

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rection of the deeds from Watkins and the other parties through whom the appellees make their title, and that there is a defect of parties, in that all the parties executing such deeds should have been made parties defendant.

The appellant misconceives the object sought by the counter-claim. Its object was to quiet title to the land in dispute as against the claim of the appellant.

To such an action the grantors of the appellees were not necessary parties.

Nor do we think the court erred in overruling the appellant's motion for a new trial. The evidence in the cause fully supports the answer and the counter-claim. The land in dispute was enclosed by a fence and was sold by Watkins and possession delivered. The party to whom he sold and his grantees have ever since been in the actual possession of the land and have made lasting and valuable improvements, and have fully paid the purchase-price. They were so in possession at the time the appellant purchased.

The objection that the verdict of the jury gave appellees more land than they were entitled to recover is not well taken. The conveyance of land bordering on a public highway, as a general rule, conveys title to the center of the highway, whether so expressed in the deed or not. *Terre Haute, etc., R. R. Co. v. Rodel*, 89 Ind. 128.

Locating the line at the center of the highway bordering the land in dispute does not give the appellees more land than they were entitled to receive under the purchase from Watkins.

There is no error in the record.

Judgment affirmed.

Filed May 20, 1891.

ON PETITION FOR A REHEARING.

COFFEY, C. J.—A petition for a rehearing is filed in this case in which it is urged that this court erred in holding the cross-complaint, filed by the appellees in the court below,

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sufficient. While the cross-complaint contains the general allegation that the appellees are the equitable owners of the land in dispute, it is claimed that the specific allegations contradict the general, and must control.

The cross-complaint is entitled, "Samuel N. Warbritton vs. Francis M. Demorett and Phoebe J. Demorett," and so much of it as is material to the controversy here is as follows:

"The above named *defendants*, Francis M. Demorett and Phoebe J. Demorett, for cross-complaint against the plaintiff, Samuel N. Warbritton, complain of said Warbritton, and say that they are the equitable owners and in the full and complete possession of the following described real estate, in Montgomery county, Indiana: * * * Cross-complainants further aver that *he* derived *his* title as follows, to wit: he, *defendant*, purchased said real estate from William Hubbard, who purchased the same from one Nathaniel Jessup, who purchased the same from one F. M. Watkins, the person from whom cross-complainants derive their title; that the said Jessup purchased the real estate * * from Watkins * * long before the cross-complainants purchased the same real estate from *Watkins*; that Watkins, at the time he sold to Jessup, put him in * * possession, * * * and that Jessup and his grantees * * * have ever since held possession thereof, * * * and have made lasting and valuable improvements thereon; that cross-complainants purchased the real estate, while * * Jessup and his grantees were in the possession thereof * * under said purchase from Watkins. * * * Cross-complainants aver that they are the owners of said real estate, and that said Warbritton is claiming some title thereto, interest in said real estate adverse to cross-complainants' said title; that the claim of said Warbritton is groundless and void, and a cloud upon cross-complainants' title."

This is by no means a model pleading, and the looseness with which it is drawn is without excuse.

The doctrine that general allegations in a pleading are controlled by specific allegations in the same pleading is too familiar to the profession to require citations, but in order to control the general allegations they must be clearly repugnant thereto, and must show that the general allegations are untrue. If the specific allegations in this pleading show that the appellees have no title, then the demurrer thereto should have been sustained, otherwise it should have been overruled. The general allegations are to the effect that the appellees are the equitable owners of the land in dispute, and are in the possession thereof; that the appellant is asserting a groundless claim to the land, which casts a cloud upon the title of the appellees.

Following these general allegations the appellees attempt to give the source of their title.

The claim of the appellant is that in the following allegation, namely, "He, *defendant*, purchased said real estate from William Hubbard," etc., the word "*defendant*" applies to the appellant, and not the appellees, and that, this being true, it appears that the appellant has the better title. We think it reasonably certain, when the whole pleading is construed together, that the appellees are attempting to give the source of their own title, and not that of the appellant.

It appears from the allegations in this cross-complaint that when Watkins sold to Jessup he placed him in the possession of the land, and that he and his grantees have ever since been in possession. It also appears that the appellees are in possession of the land, so that all the allegations in relation to possession can not be true unless the appellees are to be regarded as making their title through Jessup, and, when so regarded and treated, the allegations are reconciled, and no conflict exists.

We think the pleader by the use of the word "*defendant*," in the connection in which it is used, had reference to the defendant in the main action, and not to the defendant to the cross-complaint.

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In the case of *Indiana, etc., R. W. Co. v. Dailey*, 110 Ind. 75, the word "plaintiff" was used where the word "defendant" was intended. In commenting upon the contention that the word "plaintiff" should be read as it was written, this court said: "Merely clerical mistakes, such as the use of one word or one name for another, where, as in this case, there is and can be no possible room for doubt as to which one of two words or names the pleader intended to use, will not and ought not to vitiate the pleading, in any court, under the statutory rule that 'its allegations shall be liberally construed, with a view to substantial justice between the parties.'" See, also, *Landon v. White*, 101 Ind. 249.

When we treat the specific allegations in this cross-complaint as being descriptive of the source from which the appellees derive their title, and construe them with a view to substantial justice between the parties, we think there is no such conflict between them and the general allegations as renders the pleading bad.

Petition overruled.

Filed Oct. 15, 1891.

No. 15,648.

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STREETS.—*Opening of.*—*Appeal to Circuit Court.*—*Transcript Constitutes Complaint.*—*Objection.*—*How Stated.*—*Recitals in Transcript.*—*Inconclusiveness of.*—In proceedings to open a street under section 3180, R. S. 1881, upon appeal to the circuit court the transcript constitutes the complaint, and the appellant must state specifically in writing the grounds of his objection to the proceedings of the common council and city commissioners, and no other question can be tried or heard, and "issues of law and of fact may be found, tried and determined as in other actions at law." Upon such an appeal, an issue of fact may be raised by an objection that the resolution to refer the matter of opening the street to the commissioners was not adopted by a two thirds vote of the common coun-

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cil, as required by law. The recitals in the transcript to the contrary are not conclusive.

SAME.—City Commissioners.—Referring Back Report to.—What Reference is for.—Assessment of Additional Property.—Invalidity of.—Under sections 3174 and 3189, R. S. 1881, which provide for the referring back of reports to the city commissioners, the reference is for the purpose of re-adjusting or changing the assessment, or amending or changing the report by the commissioners as to the persons, or property of the persons, previously notified of the proceedings, and it does not contemplate any action on the part of the commissioners which will affect other persons and property. An assessment of additional property by the commissioners upon such a reference is without any authority of law and void. The statute would be void if it had contemplated the assessment of the lands of other persons upon such a reference, for it makes no provision for the giving of notice to them. It is a statute which provides for the taking of private property for public use, and must be strictly construed.

From the Carroll Circuit Court.

Q. A. Myers, M. D. Fansler, J. H. Gould and J. C. Nelson, for appellant.

L. Walker, W. B. McClintic and D. C. Justice, for appellees.

OLDS, J.—The city of Logansport, on the 1st day of December, 1886, enacted a resolution by a vote of its councilmen, referring the expediency of laying out and opening a street, specifically described in the resolution, to be called Erie avenue, to the street committee of the common council.

The matter was reported by the committee as expedient to be referred to the city commissioners, and a resolution of reference to the city commissioners was passed by a vote of the council on December 15th, 1886.

Notice was issued by the clerk to and served upon the city commissioners. The city commissioners filed their preliminary report on January 28, 1887, pursuant to section 3168, R. S. 1881, and also their notice to the city clerk, pursuant to the same section, and notice was given to the parties named in the report as affected.

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The city commissioners filed their second, and final, report May 7th, 1887.

At the regular session of the common council, of date June 1st, 1887, the final report was referred back, by the common council, to the city commissioners. The resolution of reference was in words and figures as follows :

“ Resolved, That the report of the city commissioners upon the laying out and opening of a proposed street on and over the line of the former Wabash and Erie Canal be, and the same is hereby, referred back to said city commissioners for further action, and we suggest the propriety of increasing assessments of benefits to property-owners adjacent to the line of the proposed street, and also to take into consideration the advisability and legality of assessing other property with benefits than that adjacent to the line of the proposed street ; and the commissioners are requested to meet at the council chamber of the city for further action, on the 14th day of June, 1889, at 10 o'clock A. M., which time is hereby designated for their meeting.”

Upon the matter being referred back with the suggestion stated in the resolution, Taylor, who was one of the city commissioners and who was interested in a parcel of ground lying within one square of one of the *termini* of the proposed street, declined to act further, and never afterwards met with the other four, and did not take any further part in the matter.

The other four commissioners met pursuant to the resolution of reference, and after having gone over the matter anew filed a supplemental report on the 8th day of July, 1887, in which they reported other lands than those originally reported, as affected by the proposed improvement, and, among others, the lot of said Taylor ; and thereupon adversary proceedings were taken against him by personal notice of the intended assessment against him and his lot as well as against the others reported as affected, and upon the termination of the statutory period of notice, the other

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four commissioners met pursuant to the notice filed by them with the city clerk, and the notice given the property-owners by the clerk, and proceeded to and did assess various persons, including Taylor, with benefits, whose lands were not adjacent to the line of the proposed street, and filed their final report on the 21st day of September, 1887. This report was accepted and approved by the common council, and the appropriation made by resolution of September 21st, 1887. Thereupon the appellees filed appeal bond. Taylor is not one of the appellees.

In the Cass Circuit Court appellees filed thirty-six several objections. The venue of the cause was then changed to Carroll county. Afterwards two additional objections were filed.

The appellant filed a motion to strike out each of the objections; also filed separate demurrers to each objection.

The court overruled the motion to strike out as to each objection, and the question was saved by bill of exceptions.

The court also overruled the appellant's demurrer to the second, fifth, seventeenth, twenty-fourth, thirtieth, thirty-first, thirty-seventh and thirty-eighth objections.

The second and twenty-fourth objections were then withdrawn by agreement. The appellant then filed a reply in three paragraphs.

The appellees demurred to these replies, and the demurrers were sustained, and the appellant excepted, and judgment was rendered against the city.

Errors are assigned on the rulings of the court. The fifth and seventeenth objections involve the same legal question.

The fifth objection reads as follows:

"*Fifth.* Because said common council of said city never submitted the matter of the laying out and opening said Erie avenue to the city commissioners of said city by a two-thirds vote of said common council." And the seventeenth reads as follows:

"*Seventeenth.* Because the resolution of the common coun-

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cil of said city, adopted June 1st, 1887, referring the report of said city commissioners, dated May 6th, 1887, back to said city commissioners for further action, was not passed by a two-thirds vote of said common council."

As to the fifth objection the transcript contains this entry :

"And be it further remembered, that, on the 15th day of December, 1886, the same being a regular session of the common council of the city of Logansport aforesaid, held in the council chamber of said city, present the mayor, clerk and following councilmen, being nine of the ten councilmen of said city, to wit: Messrs. Holbruner, Gleitze, Schaffer, Wilson, Hanson, Palmer, Tomlinson, McNary and Hoffman, the following proceedings, among others, were had and entered of record in Record L, page 389, of the records of said council, to wit: Mr. Wilson submitted the following resolutions: *Resolved*, That the matter of expediency, etc., * * * which was adopted by the following vote: Yeas—Holbruner, Gleitze, Schaffer, Wilson, Hanson, Palmer, Tomlinson, McNary and Hoffman."

And as to the seventeenth objection there was the following entry :

"*And be it further remembered*, That, on the 1st day of June, 1887, at a regular session of the common council of the city of Logansport, county of Cass, State of Indiana, Mayor Nelson presiding, present the clerk and the following members of the council of said city, to wit: Holbruner, McKeever, Schaffer, Wilson, Hanson, Palmer, Tomlinson, Winters, Peters and Hoffman, being all the councilmen of said city, the following proceedings, among others, in figures and words, were had and entered of record in Record L, p. 516, of the council records of said city, to wit: Mr. Tomlinson submitted the following resolution, * * * which was adopted by the following vote: Yeas—Holbruner, Schaffer, Wilson, Hanson, Tomlinson, Winters, Peters and Hoffman. Nays—McKeever and Palmer."

The statute, section 3180, R. S. 1881, provides that in

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this class of cases the transcript shall constitute the complaint, and that upon appeal to the circuit court "the appellant shall, in writing, state specifically the grounds of his objection to the proceedings of the common council and commissioners; and no other questions shall be tried or heard, except such as are with certainty to a common intent presented by the aforesaid written statement filed by such appellant." It further provides that "Issues of law and of fact may be formed, tried, and determined as in other actions at law." At the time these references were made to the city commissioners, the appellants, in the court below were not parties to the proceedings. The presumptions are in favor of the regularity of the common council, but their record is not conclusive as against the persons assessed, and it may be controverted. *City of Louisville v. Hyatt*, 36 Am. Dec. 594. In this case the persons appealing join issue on the fact as to whether or not the references were made to the city commissioners by a two-thirds vote of the common council of the city; they join this issue in the manner provided in the statute, section 3180, *supra*, by stating specifically their objection to the proceedings. It is an issue allowed to be joined by this statute, and the statute does not require the objection to be sworn to. It is true this record shows there were ten councilmen present at one time, and nine of the ten at another, but it is specifically held in the case of *Mo-berry v. City of Jeffersonville*, 38 Ind. 198, that the court has no judicial knowledge of the number of wards into which a city is divided, and, even if this were not true, it is a fact upon which an issue may be joined as to whether the reference was made by a two-thirds vote. *Prima facie* the record may establish it; but this is not conclusive. The objection was a proper pleading, joining an issue of fact, and the motion to strike out objections five and seventeen was properly overruled, as was the demurrer to such objections.

As to the other objections, they all relate to the proceedings subsequent to the filing of the first report of the city

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commissioners, assessing benefits, and, it seems to us, all that it is necessary to say is that sections 3174 and 3189, R. S. 1881, provide for the referring back of reports to the city commissioners; section 3174 providing that such report may be referred back, with such suggestions as the common council may deem proper, and the commissioners shall meet and proceed as provided in section twenty-three of the act, being section 3189, *supra*. The latter section provides for the meeting of the commissioners, and that of the action of the common council, and of the time of meeting of the commissioners, the parties interested shall take notice, without any notice whatever being served upon them.

This reference evidently is for the purpose of readjusting or changing the assessment, and amending or changing the report by the commissioners as to the persons and the property of the persons previously notified of the original proceedings, and it does not contemplate any action on the part of the commissioners which would affect other persons and property, as it does not contemplate the giving of notice to other persons, and the assessing of additional lands or the lands of other persons than those having notice of the original proceedings; and the statute would be void if it did contemplate the assessment of the lands of other persons, for it makes no provision for the giving of notice to them. This statute provides for the taking of private property for public use, and such statutes are to be strictly construed. *Town of Marion v. Skillman*, 127 Ind. 130.

The action of the commissioners in assessing the additional property on the matter being referred back to them is without any authority of law and is void. The proper conclusion was reached and judgment rendered under the facts as disclosed by the record, and it is immaterial by what method it was arrived at. The proper conclusion having been reached the judgment will not be reversed.

Judgment affirmed.

Filed Oct. 16, 1891.

Lewis et al. v. Godman.

No. 14,803.

LEWIS ET AL. v. GODMAN.

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| 129 | 359 |
| 144 | 118 |
| 145 | 254 |
| 129 | 359 |
| 159 | 482 |

PRACTICE.—*Refusal to Strike Out Pleading.*—*Not Available Error.*—No available error can be predicated on the ruling of the circuit court in refusing to strike out part of a pleading.

BILL OF EXCEPTIONS.—*Exceptions to Master's Report.*—Exceptions to a master's report can not be brought into the bill of exceptions by a "here insert," but they must be copied into the bill.

MASTER COMMISSIONER.—*Admission of Improper Evidence.*—*Report.*—*Rejection of.*—The entire report of a master commissioner will not be rejected because the commissioner admitted some improper evidence on the hearing of the cause, as the report is only advisory to the court, which may reject the conclusions reached by the master, and from the legitimate evidence in the cause state conclusions of its own.

SAME.—*New Trial.*—The action of the master in admitting illegal evidence can not be assigned as a reason for a new trial.

From the Benton Circuit Court.

U. Z. Wiley, for appellants.

W. D. Wallace and S. P. Baird, for appellee.

COFFEY, J.—The appellants and the appellee were grain merchants, engaged in buying and shipping grain, the former doing business at Ambia and Talbot, Indiana, and the latter at Lafayette, Indiana. For several years prior to the commencement of this suit the appellants had been buying and shipping large quantities of grain to the appellee, who was a large dealer, and shipped to the eastern and seaboard markets. This action was brought in the Benton Circuit Court by the appellee against the appellants to recover upon the matters set up in the complaint growing out of said business. The complaint is in two paragraphs.

The first paragraph of the complaint alleges, among other things, that from the year 1880 to the year 1884 the appellee purchased of the appellants a large number of car loads of corn, wheat, oats and other grain to be shipped to the eastern markets; that in each case the appellants guaranteed that said grain should hold out and correspond, at its desti-

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nation, in grade, quantity and quality with the grade, quantity and quality reported by the appellants to the appellee at the time of shipment; that said grain, at its destination, did not hold out and correspond in grade, quantity and quality, but fell short of the reports of the appellants to the appellee. A bill of particulars is filed with this paragraph setting forth in detail the quantity each car was short of the amount reported by the appellants.

The second paragraph is based upon an alleged verbal contract for the sale of a quantity of corn by the appellants to the appellee, alleging that the appellants failed and refused to deliver the corn sold, to the damage of the appellee.

The appellants moved the court to strike out part of the bill of particulars filed with the first paragraph of the complaint, but their motion was overruled.

Upon the issues formed, the cause was, by agreement of the parties, referred to Andrew Hall, Esq., as special master to take the evidence and make a finding of the facts in the case, and to state the accounts between the parties. It was ordered that his report should contain all the evidence given in the cause, together with all objections and exceptions made or taken by either party, and, also, his finding of facts and a statement of the accounts between the parties.

The master filed his report in the Benton Circuit Court, showing a balance due to the appellee from the appellants, upon which the court rendered judgment.

The first question presented by the assignment of error relates to the action of the circuit court in overruling the motion of the appellants to strike out part of the bill of particulars filed with the first paragraph of the complaint.

No available error can be predicated on the ruling of the circuit court in refusing to strike out part of a pleading. *Owen v. Phillips*, 73 Ind. 284; *Lowry v. McAlister*, 86 Ind. 543; *Lake Erie, etc., R. W. Co. v. Kinsey*, 87 Ind. 514; *Hope v. Applegate*, 92 Ind. 570; *City of Crawfordsville v.*

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Boots, 76 Ind. 32; *Keesling v. Watson*, 91 Ind. 578; *McFall v. Howe, etc., Co.*, 90 Ind. 148; *Losey v. Bond*, 94 Ind. 67; *Main v. Ginthert*, 92 Ind. 180; *Morris v. Stern*, 80 Ind. 227.

There is in the record, copied by the clerk, what purports to be exceptions filed by the appellants to the report of the master commissioner, but such exceptions are not embraced in a bill of exceptions. The bill of exceptions filed by the appellants, so far as it relates to this matter, is as follows: "Be it remembered that on the 6th day of December, 1888, it being the sixteenth judicial day of the November term of said court, the following proceedings were had in said cause before the Hon. Peter H. Ward, sole judge of said court. The court overruled the defendants' exceptions to the master's report heretofore filed in said cause, which exceptions heretofore filed read as follows (here insert), to which ruling of the court the defendants at the time jointly and severally excepted."

The exceptions to the report of the master commissioner are not set out in or copied into the bill of exceptions, and we have no means of knowing whether what purports to be the exceptions, copied by the clerk, is the paper which should fill the blank in the bill, or whether it is a different paper. *Kesler v. Myers*, 41 Ind. 543; *Board, etc., v. Karp*, 90 Ind. 236; *Cottrell v. Aetna Life Ins. Co.*, 97 Ind. 311; *Blizzard v. Riley*, 83 Ind. 300; *Kimball v. Loomis*, 62 Ind. 201.

Exceptions to the report of a master do not constitute a part of the record unless made so by a proper bill of exceptions. *Hauser v. Roth*, 37 Ind. 89.

The exceptions to the report of the master commissioner, filed by the defendants, not having been brought into the record by the necessary bill of exceptions, can not properly be considered by us. But treating the paper copied by the clerk as the exceptions filed by appellants to the report of the master, we think there was no error in overruling the same.

The exceptions, assuming such paper to be such, sought to

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reject the entire report, on the ground that the master commissioner had admitted improper evidence on the hearing of the cause. Such report could be rejected for this reason only upon the ground that the court was bound by the conclusion of facts stated by the commissioner, whereas the report was only advisory to the court, and it was at perfect liberty to reject the conclusions reached by the master, and from the legitimate evidence in the cause, state conclusions of its own. *Bremmerman v. Jennings*, 101 Ind. 253.

Had the appellants sought by their exceptions to eliminate from the record the improper evidence admitted by the master, and sought an adjudication of the case upon the legitimate evidence, a different question would have been presented, but as they sought to reject the entire report on the ground that the master admitted and reported illegal evidence, there was no error in overruling such exceptions.

It was assigned as a reason for a new trial that the master commissioner erred in admitting illegal evidence on the hearing of the cause.

This is not one of the statutory causes for a new trial. The evidence in the cause was reported to the court, and it was its duty to consider the same, and either adopt such conclusions as were reached by the master, or find conclusions of its own, as the evidence required. No question as to the action of the master in the admission of evidence can be presented to this court without an opportunity afforded to the circuit court to correct the error, if any exists, in the admission of such evidence. Following the proper effort in the circuit court to correct such error, and a refusal of the court to grant the proper relief, the action of the court would be subject to review here, but the action of the master in admitting evidence on the hearing of the cause before him can not be assigned as a reason for a new trial, because, as we have seen, where the order of reference requires him to report the evidence, the cause is ultimately tried by the court, and not by the master commissioner.

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It is also urged by the appellants that the finding of the master in relation to a set-off pleaded by them against the appellee is not sustained by the evidence, but it is conceded that the evidence in relation to the matters set up in this plea is conflicting. Where the evidence is conflicting, this court will not disturb the finding of the trial court.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed.

Filed May 15, 1891; petition for a rehearing overruled Oct. 16, 1891.

 No. 15,078.

SMITH v. SCHWEIGERER.

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| 162 | 635 |

VENDOR AND PURCHASER.—Notice.—If a purchaser of land have notice of facts making it incumbent upon him to make due inquiry, he is bound by all the knowledge which a reasonable inquiry would have imparted.

SAME.—Bona Fide Purchaser.—Who is not.—One who purchases with full knowledge of prior equitable or legal rights is not a purchaser in good faith.

SAME.—Notice Before Payment of Purchase-Money.—Notice before payment of the purchase-money prevents the acquisition of the character of a bona fide purchaser.

SAME.—Description of Land.—Correction of Mistakes.—Mistakes in the description of land may always be corrected against a party who buys with full knowledge of another's prior purchase of land from the same grantor.

PLEADING.—Deed.—Exhibit.—Deeds or other instruments forming evidence of title are not the foundation of pleadings asserting title, and if made exhibits they will be disregarded.

From the Carroll Circuit Court.

L. D. Boyd and J. C. Claybaugh, for appellant.

J. A. Sims, for appellee.

ELLIOTT, J.—The appellant alleges in his complaint that

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he is the owner in fee of a tract of land through which flows a stream called Wild Cat creek ; that the appellee is wrongfully threatening to construct a dam across the stream upon the land of the appellant. Prayer for an injunction.

The appellee's second paragraph of answer alleges that William Stranahan was the owner of the land described in the complaint, as well as of another part of the same section ; that Stranahan sold the land described in the complaint to the appellee for three hundred and fifty dollars ; that the land was bought for a mill site, and for that purpose sold ; that the purchase of the appellee included the right to water and to construct the necessary mill race ; that the purchase-money was paid on the 9th day of July, 1873, and, on that day, possession of the land was delivered to the appellee, who still continues to hold possession ; that on the day the purchase-money was paid Stranahan executed to the appellee a bond conditioned for the conveyance of the land and the mill privileges ; that, subsequently, Stranahan and his wife executed a deed to the appellee for the property ; that the dam which the appellee proposes to erect is at the place and of the height provided for in the contract with Stranahan ; that the appellee has erected a mill in part and has entered upon the work of digging a mill race ; that the appellant had knowledge of the possession and acts of the appellee and knew that he had expended in the work upon the mill and race the sum of two thousand dollars ; that the only title which the appellant has to the land was derived from William Stranahan long after the purchase by the appellee ; that the appellant, at the time he purchased, had full knowledge of the appellee's interest in the property and purchased subject to that interest. The third paragraph of the answer sets forth substantially the same facts as the second, differing from it in one respect, and that is, in alleging a mistake in describing the land intended to be conveyed.

The answers are good. The demurrer of the appellant

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confesses that possession was taken by the appellee; that improvements were made under claim of ownership; that the appellant had notice of these facts before he purchased, and took title subject to the rights of the appellee. The appellee was first in point of time, and his possession was indicated by acts assertive of ownership, so that the appellant was put upon inquiry. As he had notice of facts making it incumbent upon him to make due inquiry, he is bound by all the knowledge which a reasonable inquiry would have imparted. *Harper v. Ely*, 56 Ill. 179; *Kuhns v. Gates*, 92 Ind. 66. But in this instance there was not merely notice of facts putting the party upon inquiry, but there was also notice that the person in possession was there as owner. It is impossible, therefore, to regard the appellant as a *bona fide* purchaser. One who purchases with full knowledge of prior equitable or legal rights is not a purchaser in good faith. Notice before payment of the purchase-money prevents the acquisition of the character of a *bona fide* purchaser. *Anderson v. Hubble*, 93 Ind. 570. Mistakes in the description of land may always be corrected against a party who buys with full knowledge of another's prior purchase of land from the same grantor. *Lewis v. Phillips*, 17 Ind. 108; *Cordova v. Hood*, 13 Am. L. Reg. 334; *Moreland v. Lemasters*, 4 Blackf. 383; *Campbell v. Brackenridge*, 8 Blackf. 471; *Warren v. Richmond*, 53 Ill. 52.

Deeds or other instruments forming evidence of title are not the foundation of pleadings asserting title, and should not be made exhibits. If they are made exhibits they will be disregarded, and only the allegations of the pleading itself be considered. We can not look to the exhibits, for they are no part of the pleadings. This rule has been asserted in a great number of cases.

It is undoubtedly true, as a general rule, that a party who asks relief in equity must proceed with reasonable promptness, but that rule does not defeat one in the position of the appellee. He did take immediate possession of the land; the

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appellant knew that he was in possession as an owner who had paid for the land, and yet refrained from questioning his title for many years, so that it was the appellant, and not the appellee, who slept upon his rights. But however this may be, it is quite clear, that the appellee was not in fault, for it does not appear that he knew of the mistake in describing the land until the appellant challenged his title by this suit. The nature of the acts done, and the character of the improvements made, fully informed the appellant before he purchased that the appellee was in possession as owner, and it was not possible that the appellant could have been misled or injured.

It was proper to permit the appellee to prove all the acts performed by him in erecting the mill and supplying it with power. Such acts were evidence of ownership, of the nature of the possession, and of the character and extent of the rights asserted.

Judgment affirmed.

Filed Oct. 17, 1891.

No. 14,719.

MAYER v. MYERS, ADMINISTRATOR, ET AL.

CHATTEL MORTGAGE.—*Failure to Record.*—*Decedents' Estates.*—*Rights of Creditors.*—The fact that a chattel mortgage is not recorded is not a defence that can be made by the administrator or heir of the deceased against its foreclosure, not even if the estate be insolvent.

From the Montgomery Circuit Court.

J. R. Courtney, for appellant.

J. E. Humphries, L. J. Coppage, M. D. White, W. M. Reeves and W. E. Humphrey, for appellees.

OLDS, J.—This action was brought by certain creditors of the estate of Charles C. Sidener, deceased, of whose estate

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Noah E. Myers was the duly appointed administrator, to foreclose a certain chattel mortgage.

The appellant filed a cross-complaint, asking to have a chattel mortgage in his favor foreclosed, and to have it declared a prior lien. The appellees, Noah Myers, administrator of the estate of Charles C. Sidener, and the widow of said decedent, filed an answer to the cross-complaint, to the fourth paragraph of which a demurrer was addressed by the appellant and overruled by the court. This paragraph of answer of the administrator and widow averred the fact that the decedent, at the time of the execution of mortgage, and ever after, up to the date of his death, was a *bona fide* resident of Montgomery county, and that the mortgage was recorded in Fountain county, and not in Montgomery county; that the estate is insolvent, and the deceased remained in possession of the property until the time of his death.

There is some conflict in the authorities upon this question, but the rule as laid down in Jones on Chattel Mortgages (3d ed.), sections 239 and 240, is to the effect that the fact that the mortgage is not recorded is not a defence that can be made by the administrator or heir of the deceased against its foreclosure, not even if the estate be insolvent. This seems to be the settled rule as to mortgages on real estate (*Evans v. Pence*, 78 Ind. 439), and we see no valid reason why the same rule should not apply to unrecorded mortgages on personal property as is applied to unrecorded mortgages on real estate.

The general creditors have no lien on the personal property of the deceased. Such portion of it only as would in the absence of debts descend to the heirs is subject to the payment of the debts due the general creditors, and the creditor has no right to test the validity of an unrecorded mortgage until he himself has a lien upon the property mortgaged, hence if the mortgage is valid as to the mortgagor, he leaves nothing to descend to his heirs except the property subject to the mortgage lien. This is the doctrine as laid

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down in Jones on Mortgages, section 240, *supra*, and we think it enunciates the correct rule. *Sumner v. McKee*, 89 Ill. 127.

It follows from the conclusion we have reached that the court erred in overruling the demurrer to the fourth paragraph of answer of the administrator and widow to the appellant's cross-complaint.

The judgment is reversed, at costs of appellees, with instruction to sustain the demurrer to the fourth paragraph of answer of Noah E. Myers, administrator, and Minnie E. Sidenor to the cross-complaint of Anton Mayer, and for further proceedings not inconsistent with this opinion.

Filed May 25, 1891; petition for a rehearing overruled Oct. 17, 1891.

No. 15,117.

THE WAYNE PIKE COMPANY v. HAMMONS ET AL.

PLEADING.—*Supplemental Complaint.*—*Demurrer.*—A motion to strike out a supplemental complaint may properly be overruled.

SAME.—*Demurrer.*—Sustaining a demurrer defective in form to a pleading which is wholly insufficient is not available error.

CORPORATION.—*Misappropriation of Corporate Funds by Officers.*—*Action by Stockholder for Receiver.*—*Pleading.*—Where a majority of the directors of a corporation are charged with a misappropriation and conversion of the assets of the corporation, a complaint by a stockholder for an accounting and the appointment of a receiver need not allege that before the commencement of the action a demand was made upon the directors to bring suit in the name of the corporation.

SAME.—*Conversion.*—*Interest.*—Where the secretary and treasurer of a corporation fraudulently appropriates to his own use, under the guise of salary, large sums of money belonging to the corporation, he is liable for interest on the amount so appropriated.

SAME.—*Turnpike Company.*—*Refusal of Officers to Make Repairs.*—*Appointment of Receiver.*—Where the owners of the majority of the corporate stock of a turnpike company neglect and refuse to make needed repairs in the

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| 154 | 29 |
| 154 | 321 |
| 156 | 582 |
| 129 | 368 |
| 157 | 297 |
| 157 | 299 |

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roadway, thus rendering the property non-productive, the court may properly appoint a receiver.

SAME.—*Sale of Property.*—*Decree.*—Where a suit brought by a stockholder against a corporation and its officers merely seeks an accounting and the appointment of a receiver, a decree ordering a sale of the property is erroneous.

COURTS.—*Continuance Beyond Term.*—The adjournment of the trial of a cause which is in progress the last day of a term to a subsequent day, when the trial is again resumed, is not an adjourned term, but is a continuation of the existing term under the provisions of section 284, Elliott's Supp., and no notice is necessary.

From the Jay Circuit Court.

D. T. Taylor, R. H. Hartford, J. B. Jaqua, J. A. Jaqua, F. Winter and J. B. Elam, for appellant.

J. M. Smith, T. Bosworth, F. H. Snyder and J. R. Perdiéu, for appellees.

CORREY, J.—This was an action by the appellees, as stockholders in the Wayne Pike Company, a gravel road corporation organized under the laws of this State, against said company and Alonzo L. Jaqua, James B. Jaqua, Judson A. Jaqua, Christopher S. Arthur and Daniel Miller, as the officers of said corporation, to compel an accounting, and to obtain the appointment of a receiver.

Among other things, the first paragraph of the complaint alleges that after the construction of the gravel road the defendant Alonzo L. Jaqua became the owner of one hundred and seventy-five shares of the capital stock of said corporation; that defendant James B. Jaqua became the owner of two shares, and the defendant Judson A. Jaqua became the owner of one share of said capital stock, which shares of said stock held by them constituted a majority of the shares of stock subscribed in said corporation; that said defendants so holding said stock, conspiring together for the purpose of cheating and defrauding the plaintiffs and other holders of shares of stock in said company and to render their stock in said corporation worthless, elected

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themselves directors of said corporation; that on the — day of —, 188—, as such board, they assumed and took the sole and exclusive control and management of said gravel road and elected and appointed the defendant Alonzo L. Jaqua secretary and treasurer, and the defendant James B. Jaqua president thereof; that said defendants, having thus conspired together to cheat and defraud the plaintiffs, and, in pursuance of such conspiracy, having obtained possession of the property of said corporation, its books, papers and records thereto belonging, have been guilty of fraudulent, illegal and oppressive acts in the management of said corporation, as follows, to wit:

First. That they take all the revenues, income, profits and earnings of said corporation, derived from the toll collected thereon and therefrom, and fraudulently and illegally appropriate the same to their own use and benefit, and wholly refuse to permit the plaintiffs to have anything to do or say in the management of the affairs or business of said corporation.

Second. That, although the earnings of such gravel road are largely in excess of what it takes to keep the same in repair and pay the expenses of its officers and their salaries, the said defendants (Jaqua, Jaqua and Jaqua), acting as its officers, refuse to keep said road in repair and refuse to pay any dividends, but appropriate the said undivided proceeds to their own private use and benefit.

Third. That said defendants, acting as such officers of said corporation as aforesaid, to further cheat and defraud these plaintiffs, refuse and fail to keep accurate accounts of the receipts and disbursements, and refuse to keep the books thereof open for examination by the said plaintiffs or either of them.

Fourth. That said defendants Jaqua, Jaqua and Jaqua fraudulently conspire together, elect and keep in office Alonzo L. Jaqua, as secretary and treasurer of said corpora-

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tion for the purpose of absorbing the earnings, profits, effects and moneys belonging to such corporation.

Fifth. That said defendants Jaqua and Jaqua, acting as the majority of the board of directors, under such conspiracy, have from time to time since the 1st day of January, 1880, and the — day of —, 1888, allowed and caused to be allowed large and exorbitant sums of money to Alonzo L. Jaqua, as his salary as secretary and treasurer, aggregating in the amount of five thousand dollars, which sum of money for such salary was unreasonable and unjust and was made and ordered to be paid by them for the purpose of absorbing the earnings, proceeds, profits and moneys belonging to said corporation.

Sixth. That the earnings, profits and moneys have amounted to the sum of twenty thousand dollars since the 1st day of January, 1880, which sum of money has been absorbed by the said defendants Jaqua, Jaqua and Jaqua, and to each of them, for the sole purpose of cheating and defrauding these plaintiffs and the other stockholders, not herein named.

Seventh. That said defendants Jaqua, Jaqua and Jaqua, having conspired together as aforesaid, to cheat and defraud these plaintiffs as aforesaid, have diverted the moneys, profits and earnings belonging to said corporation for the purpose of further absorbing the same, in this, to wit: The said Alonzo L. Jaqua caused to be purchased and did purchase a large fire and burglar proof safe at and for the price of fifteen hundred dollars, which safe was not needed in the business of the corporation, and was purchased without the knowledge or consent of the stockholders or the board of directors of said corporation, and which safe has been used since its purchase by the said Alonzo L. Jaqua in his own private business.

Eighth. That the said defendants Jaqua, Jaqua and Jaqua refuse to allow these plaintiffs to participate in any of the business transactions of said corporation, and refuse to

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make known any of the business meetings of said corporation to the stockholders, and refuse and neglected to give notice thereof to any of the stockholders, and especially these plaintiffs.

Ninth. That the said defendants Jaqua, Jaqua and Jaqua, having thus conspired as aforesaid to cheat these plaintiffs and the other stockholders, not named herein, refuse to permit these plaintiffs to examine any of the books or papers or accounts belonging to said corporation, but keep the same concealed and within themselves.

Tenth. That said defendant Alonzo L. Jaqua, having conspired as aforesaid with the defendants Judson A. and James B. Jaqua, for the purpose of cheating and defrauding the plaintiffs as aforesaid, has appropriated to his own private use as aforesaid moneys, rights, credits, effects, choses in action and property belonging to said corporation, the sum of ten thousand dollars.

Eleventh. That the said defendants Jaqua and Jaqua, having a majority of said stock, and having conspired together as aforesaid to cheat and defraud these plaintiffs and other stockholders aforesaid, refuse to elect any stockholder a director in said corporation who will not agree to elect the said Alonzo L. Jaqua secretary and treasurer of said corporation.

Twelfth. That the said defendants Jaqua, Jaqua and Jaqua have failed and refused to collect from persons travelling on said road toll to the amount of one thousand dollars.

Thirteenth. That said defendants Jaqua, Jaqua and Jaqua have failed and refused to account to the stockholders of said association for money, credits and effects and property received by them as officers of said corporation.

Fourteenth. That said defendants Jaqua, Jaqua and Jaqua, acting as directors of said association, have failed, neglected and refused to establish salaries of the officers of said corporation, have failed, neglected and refused to make and pass ordinances and by-laws as required by law for the govern-

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ment of said corporation, and have failed, neglected and refused to make correct financial statements to the recorder of Jay county, as required by law; that all statements that were made and recorded in the recorder's office of Jay county were incorrect and untrue.

Fifteenth. That the said defendants Jaqua, Jaqua and Jaqua refuse to bring any suit to compel an accounting by the officers, the secretary and treasurer of said corporation, but knowingly permit the said secretary and treasurer, the defendant, Alonzo L. Jaqua, to absorb, appropriate to his own use and benefit, and divert the income, earnings and profits of said corporation.

Sixteenth. That said defendants Jaqua, Jaqua and Jaqua, further conspiring together to cheat and defraud these plaintiffs and other stockholders not named herein, refuse to keep any books and accounts at the toll-houses and toll-stations by the gate-keepers on said road.

Seventeenth. That by the articles of association it is required that there should be elected from among the stockholders a board of five directors; that to fulfill such requirement, the said defendants Jaqua, Jaqua and Jaqua cause to be elected, and did elect, the defendants Christopher S. Arthur and Daniel Miller, as directors, well knowing that neither of them would take any part in the business of said corporation, or in the meetings of said board, and that they have wholly failed to have anything to do with the business transactions of said corporation, and knowingly stand by and witness the transactions of the said officers Jaqua, Jaqua and Jaqua, and refuse to bring any suit to compel any accounting from them, or either of them.

Eighteenth. That all orders for the payment of money out of the treasury of said corporation has been allowed by the defendants Jaqua, Jaqua and Jaqua, and no other persons.

Nineteenth. That the said defendant Alonzo L. Jaqua threatens to allow said gravel road to go down and become out of repair and worthless, and that he threatens to still

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absorb and appropriate all of the income and profits of said corporation if he is permitted to keep the control and management of the same.

Twentieth. That the defendants James B. and Judson A. Jaqua will, if suffered to do so, continue to keep the said Alonzo L. Jaqua in office as secretary and treasurer for the purpose of absorbing the earnings, income and profits of said corporation, and rendering the stock of these plaintiffs worthless and of no value.

Twenty-first. That said Alonzo L. Jaqua threatens, and will, if any judgment is rendered against him or James B. Jaqua in favor of the Wayne Pike Company, to receipt for the same as secretary and treasurer thereof, and absorb and appropriate the same to his own use; that defendant Cornelius Corwin is the owner of one share of stock in said corporation, and is made a party to answer as to his interest.

The second paragraph of the complaint is substantially the same as the first, except that it alleges the misappropriation of the funds of the corporation by Alonzo L. Jaqua, aided and encouraged therein by James B. Jaqua and Judson A. Jaqua.

This complaint was filed on the 20th day of June, 1888. On the 20th day of October, 1888, the appellees filed what it terms a supplemental complaint, which recites the pendency of the action and many of the allegations contained in the first paragraph of the original complaint, and in addition thereto alleges, in substance, that since filing the first paragraph of the complaint the appellants have failed to repair the gravel road, and have suffered the same to become badly out of repair; that some of the culverts have broken down, and that appellants had torn up all the floors of a large bridge across a river on said road, and rendered the same impassable for the period of six weeks; that defendants wholly refuse to repair said road, culverts, or bridge, and say that they do not intend to repair the same; that there is another large bridge on said

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road which is greatly out of repair, and has been dangerous for the public to travel over for the period of three months, and is now wholly impassable; that by reason of the condition of said road no tolls can be collected for travel thereon, and that the corporation is in great danger of damage suits, and that the plaintiffs, as stockholders, have no money with which to repair said road.

Prayer that the court appoint a receiver; that he be ordered to repair said road, and that defendants be compelled to pay over to him sufficient of the money in their hands to pay for such repairs.

The court overruled a motion to strike out the supplemental complaint.

The supplemental complaint constitutes a part of the original complaint, and does not supersede it, but they both stand, and constitute the complaint in the cause. *Farris v. Jones*, 112 Ind. 498.

The court overruled a demurrer to each paragraph of the above complaint. The assignment of errors calls in question the propriety of this ruling.

Passing, without special mention, numerous objections to the complaint, of a technical character, which, under the provisions of section 398, R. S. 1881, we are bound to disregard, we come to the objections of a more substantial character.

It is earnestly contended, and ably maintained by plausible argument, as well as by the citation of numerous authorities, that each paragraph of the complaint is fatally defective by reason of the failure to allege that the appellees, before the commencement of this suit, made a demand upon the directors of the corporation, while in session, to bring the suit in the name of the corporation.

Conceding that the cases are numerous in which such demand is necessary, we do not think this case belongs to that class. In this case something more than a mere accounting is sought, namely, the appointment of a receiver to take

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charge of the corporate property. The parties out of whose hands it is proposed to take the management of the affairs of the corporation, and who are called upon to account for a misappropriation and conversion of the corporation assets, constitute a majority of the directors. It would not be reasonable to require those who are charged with a conversion of the assets, to bring suit in the name of the corporation against themselves, and to furnish the proof to sustain the charge, and at the same time ask the court to take the property from their charge on account of their misconduct. Such a suit would be a farce, and it would be beyond reason to refuse the appellees relief because they did not demand that such a proceeding be had before they commenced their suit.

Cook on Stocks and Stockholders, section 741, in treating this subject, says: "There are occasions when the allegation that the stockholder has requested the directors to bring suit and they have refused, may be omitted, since the request itself is not required. This occurs when the corporate management is under the control of the guilty parties. No request need then be made or alleged, since the guilty parties would not comply with the request; and even if they did the court would not allow them to conduct the suit against themselves." The author cites many authorities which fully support the text.

Mr. Waterman, in his work on Corporations, vol. 1, page 467, says: "The corporation may call its officers to account if they wilfully abuse their trust or misapply the funds of the company; and if it refuses to sue, or is still under the control of those who must be made defendants in the suit, the stockholders, who are the real parties in interest, may file a bill in their own names, making the corporation a party defendant, or part of them may file a bill in behalf of themselves and all others standing in the same relation."

Where a majority of the stock of a corporation is held by

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one family who vote away the corporation profits for salaries, a court of equity will remedy the fraud. Cook Stock and Stockholders, section 657.

In the case of *Carter v. Ford, etc., Co.*, 85 Ind. 180, it was held that where the corporation was in the hands of its enemies the stockholders might maintain an action, which, if successful, would enure to the benefit of the corporation. See, also, *Rogers v. Lafayette, etc., Works*, 52 Ind. 296.

The officers of a corporation are its agents, and they are governed by the rules of law applicable to other agents, as between themselves and their principal, in so far as such rules relate to honesty and fair dealing in the management of the affairs of their principal. They can no more use the business of their principal for their own private gain than any other agent, and should they do so they should be held to the same strict rule of accountability as the agent of a private person. *Port v. Russell*, 36 Ind. 60; *Aberdeen Railway Co. v. Blakie*, 1 Macq. 461; *Michoud v. Girod*, 4 How. 502; *Cumberland, etc., Co. v. Sherman*, 30 Barb. 553.

If the appellants conspired together for the purposes alleged in the complaint, each became liable for any act done by any one of the three in furtherance of the common design.

By the act of conspiring together the conspirators assumed to themselves the attribute of individuality, so far as regards the prosecution of the common design, thus rendering what was said or done by any one, in furtherance of the design, the act of all. *Wells v. State*, 125 Ind. 400; 3 Greenleaf Evidence, section 94.

In our opinion each paragraph of the complaint states a cause of action, and the court did not err in overruling a demurrer thereto.

Each of the appellants filed a separate answer, in which he averred that the appellees did not demand of the directors of the corporation that suit be instituted in the name of the

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corporation before the commencement of this suit. To these answers the court sustained a demurrer.

What we have already said disposes of the principal question here presented.

It is contended, however, that the demurrer was so defective in form that it should have been disregarded by the court. Assuming this to be true, the error of the court, if there exists an error, was one which did not harm the appellants.

The answers were wholly insufficient to bar the right of action set up in the complaint, and for that reason the appellants were not harmed by sustaining a demurrer thereto, though the demurrer may have been defective in form.

A trial of the cause by the court resulted in a finding and judgment in favor of the appellees, and a decree appointing a receiver, and ordering the property of the corporation sold and the proceeds divided among the stockholders.

It is insisted by the appellants that the finding of the court is not sustained by the evidence. It is true there is no direct evidence upon the subject of the conspiracy charged in the complaint, but the evidence in proof of a conspiracy will, generally, from the nature of the case, be circumstantial. 3 Greenleaf Evidence, section 93.

We can not say the court was not authorized to find from the evidence in the cause that there was a common design on the part of the appellants to absorb a large portion of the income of the corporation by the allowance of a salary to the secretary and treasurer, which was, by the court, under the evidence, found to be exorbitant.

We can not, under the well-known rules of this court, disturb the finding on the evidence.

It is further contended by the appellants that the damages assessed by the court were too large. This contention is based upon the fact that the court allowed interest on the amount, or a portion of the amount, appropriated or used by the appellants.

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The argument is that the money received by the treasurer belonged to him, and that he had the right to use it so long as he furnished the amount due when called upon to do so.

The argument is based upon false premises. The treasurer of a private corporation does not bear that relation to the funds which come into his hands sustained by a public officer. A public officer, when called upon to account for moneys which come into his hands, as such, can not excuse himself on the ground that the funds have been stolen, or destroyed, without his fault, because, by legal fiction, the money is supposed to belong to him, and he must bear the loss. Such fiction is thought to be necessary for the safety of the public funds. But it is not so with the treasurer, or agent, of a private corporation. If the funds in his hands are lost, or destroyed, without his fault, the loss is the loss of the principal, and not the loss of the treasurer, or agent. *Mowbray v. Antrim*, 123 Ind. 24.

A large portion of funds involved in this suit was allowed to the secretary and treasurer as salary, and presumably he used the sum so allowed him. The court found that such salary was exorbitant and unreasonable, and required the appellants to account for all the funds used in that way over and above a reasonable compensation for the services of the secretary and treasurer.

If these funds were used, we know of no good reason why those who used them should not account for interest. We do not think the court erred in charging the appellants with interest on the funds which came into their hands, and which were used by the secretary and treasurer, in his private business, under the guise of an exorbitant salary.

Nor do we think the court erred in appointing a receiver in this case. The power to make such appointment is conferred by the 7th clause of section 1222, R. S. 1881. *Connelly v. Dickson*, 76 Ind. 440; *Hellebush v. Blake*, 119 Ind. 349.

Indeed, it was a case eminently proper for the exercise of such power. Those who owned the majority of the stock in

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the corporation, and were able by reason of that fact to control the road, seem to have been derelict in the matter of repairs, thus endangering the rights of the other interested parties, and rendering the property non-productive. Under these circumstances it was the duty of the court, when asked to do so, to take such steps as would secure to the minority stockholders their rights in the property, and we know of no means by which this could be accomplished except by the appointment of a receiver.

It is insisted that the court trying this cause had no power or jurisdiction to try and dispose of the same. The cause was tried before the Hon. A. A. Chapin, a special judge appointed by the regular judge of the Jay Circuit Court, to try and dispose of the same.

The record discloses the fact that the parties to this suit entered upon the trial of the cause, by agreement, on the 9th day of January, 1889, the same being the twenty-eighth judicial day of the December term of the court. The trial was continued from day to day until and including the 12th day of January, when the taking of further evidence was adjourned, without fixing a definite day upon which the trial should be resumed.

On the 19th day of January, 1889, the same being the last day of the December term of the court in Jay county, the court adjourned the further hearing of the cause until the 12th day of February. On the 12th day of February the trial was resumed and proceeded to final judgment.

At the time the further hearing of the cause was adjourned from the 19th day of January until 12th day of February, the appellants objected, and their objection being overruled, they filed a proper bill of exceptions. So, on the 12th day of February, at the proper time, they objected to proceeding with the trial, but the court held that the objection was not well taken, and they again excepted. No notice of an adjourned term of court was given.

In our opinion this was not an adjourned term under the

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provisions of sections 1333 and 1380, R. S. 1881, but it was a continuation of the existing term under the provisions of section 284, Elliott's Supplement, and, therefore, no notice was necessary.

Section 284, *supra*, provides that "If at the expiration of the time fixed by law for the continuance of the term of any court, the trial of a cause shall be progressing, said court may continue its sitting beyond such time, and require the attendance of the jury and witnesses, and do, transact and enforce all other matters which shall be necessary for the determination of such cause; and in such case, the term of said court shall not be deemed to be ended until the cause shall have been fully disposed of by the court."

As said in the case of *Perkins v. Hayward*, 124 Ind. 445, "The special judge did not fix a term of court; he did no more than continue a trial regularly entered upon at a term fixed by law."

Nor do we think the objection that the trial was not continued from day to day is well taken. To hold that the court would lose jurisdiction over the cause by a failure to continue in the trial from day to day might defeat the evident intention of Legislature in the passage of this statute. The intention evidently was to save to parties and litigants in court the expense of twice investigating the same matter, and of calling witnesses for that purpose.

In a protracted trial it may become necessary to adjourn for a given period on account of the illness of the presiding judge, or the illness of one of the parties to the cause, or on account of the inability of a witness to attend, or some other cause; and to hold that the adjournment to a given day on account of one of these causes, or for any other sufficient reason, would defeat the jurisdiction of the court would, we think, defeat the purpose of this statute. The record does not disclose the reason for adjourning the trial from the 19th day of January to the 12th day of February, but, as everything is presumed to have been rightly done in court, we

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must presume there was some sufficient reason for such adjournment.

At the proper time the appellants moved the court to modify the decree in this case by striking therefrom so much as orders a sale of the corporate property. The motion was overruled, and the appellants excepted.

We think the court erred in overruling this motion. There was no issue in the cause upon which such an order could be based.

By their complaint the appellees sought nothing further than an accounting and the appointment of a receiver, and they were not entitled to more than they sought. Neither party in the pleadings seeks a sale of the corporate property. A decree of a court as to a matter not involved in the issues in the cause is erroneous. *McFadden v. Ross*, 108 Ind. 512; *Ringgenberg v. Hartman*, 124 Ind. 186.

Many other questions of minor importance have been argued by counsel in their able briefs in this cause, which have been duly considered, but the questions here decided are the controlling questions in the cause. No good purpose would be subserved by setting out in this opinion questions which do not control its decision.

So much of the decree of the circuit court as orders a sale of the corporate property is reversed, at the costs of the appellees. The judgment and decree of the circuit court in all other matters is affirmed.

Filed April 29, 1891; petition for a rehearing overruled Oct. 17, 1891.

Koons, Guardian, *et al.* v. Blanton.

No. 14,702.

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DEED.—Reformation.—A court of equity will reform a written instrument not only in cases of mutual mistake, but also when, by the fraud of one of the parties to the instrument, the language inserted in it is materially different from that agreed on.

SAME.—Fraudulent Omission.—Fraud of Husband.—Wife's Excuse for not Having Deed Read.—Where a husband, after deserting his wife, proposed to her to join him in conveying a tract of land to their children, reserving to her the rents and profits during her life, and the wife, who was unable to read, in good faith joined in the execution of the deed, but the husband procured the deed to be so written that it would convey the fee to the children without the reservation of rents and profits agreed upon, which deed was signed by the wife upon the representation of the husband that it was prepared in accordance with the agreement,

Held, that the wife had a right to rely upon the husband's sincerity, and that a sufficient excuse for her not having the deed read is shown.

SAME.—Laches.—In a suit by the wife for a reformation of such deed, the fraud was admitted and the answer alleged that the suit was not instituted until nine years after the fraud was discovered; that the wife surrendered her possession of the land at the request of the children's guardian; that the guardian rented the land, and expended part of the rents in the improvement of the land and part in compensating the wife for the maintenance of the children; that the guardian, to make the improvements and provide for the maintenance of the children, had anticipated rents and profits for several years in advance.

Held, that the delay of nine years in bringing the suit was not such laches as made the wife's equity stale and barred relief.

SAME.—Husband and Wife.—Separation.—Judgment for Alimony no Bar to Action for Reformation.—A judgment for alimony recovered by the wife in a suit for divorce after the execution of the deed is no bar to the action for its reformation, as there is no question of property rights between the husband and wife.

PRACTICE.—Equity.—Submission to Jury of Questions of Fact.—Objection to Manner of Submission.—Interrogatories and Instructions.—Where, in a suit in equity, the court submits questions of fact to the jury, it is not bound by their verdict, which is merely advisory, and may disregard their findings. The parties can not complain of the manner in which the questions of fact are submitted to the jury, or object to the form of the interrogatories or instructions.

From the Henry Circuit Court.

Koons, Guardian, *et al.* v. Blanton.

J. Brown, W. A. Brown and W. E. Niblack, for appellants.

C. S. Hernly and J. M. Morris, for appellee.

MCBRIDE, J.—On the 28th day of January, 1878, one Michael Ricker resided in Henry county, where he owned and occupied a tract of land. The appellee, Mary Blanton, was his wife, and appellants Lillie E., Viola and Hattie Ricker were their children. On said day, the husband and wife joined in executing a warranty deed conveying the land in question to their said children. Michael Ricker had previously abandoned his family, and was, at the time, living in a state of adultery.

This suit was commenced on the 23d day of August, 1887, by appellee, who alleges in her complaint, in substance, that, prior to the making of said deed, her said husband, pretending to be desirous of providing for her support, and for the support of their said children, proposed to her to join him in conveying said land to said children, reserving to her, in lieu of her inchoate interest in said land as his wife, the rents and profits thereof for the term of her natural life; that being at the time greatly distressed in mind because of her said husband's conduct, and his abandonment, but believing his said proposition to be made in good faith, she consented to join in the execution of such deed; that thereupon said Michael procured a notary to prepare the deed, and, with the intention of cheating and defrauding her out of her interest in said land, he instructed and procured the notary to so write the deed that it would convey said land in fee to said children, without any reservation to her of rents and profits, or of any interest therein; that he thereupon represented to her that the deed was prepared in accordance with their agreement, reserving to her said rents and profits, and that she, being unable to read or write, and in great mental distress, but relying on his assurance that, as prepared, said deed did reserve to her the rents and profits

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of the land for and during her life, she signed and acknowledged it; that she received no consideration for the deed; that her said husband having abandoned his said family and made thereafter no provision whatever for their maintenance, appellant Benjamin F. Koons was appointed guardian of said children, and as such guardian is in possession of said land. The prayer of the complaint asked for the reformation of the deed and for other equitable relief.

The court having overruled a demurrer to the complaint, the appellants excepted, and answered in five paragraphs. A demurrer to the fifth paragraph was sustained, to which ruling appellants excepted.

This paragraph is as follows :

"5. The defendants, for further answer, say that on the — day of December, 1884, one Charles S. Hernly was, by the Henry Circuit Court, duly appointed as their guardian, and as such duly inventoried and took charge of the land named in the complaint; that in the month of March, 1881, said guardian rented said premises to one David Huddleson for one year from that time, and at the time of said renting the plaintiff and these defendants were in possession of the same; that said guardian notified the plaintiff that he had so rented said premises as the property of these defendants, his then wards, and requested her to vacate said premises, and that, for the purpose of letting said lessee into said premises pursuant to said contract, the plaintiff did then and there move out and vacate said premises, and allowed said tenant to take possession thereof, and has ever since that time remained out of possession; and the said Hernly, so long as he remained the guardian of these defendants, and his successor, B. F. Koons, who became the succeeding guardian, have ever since had possession and control of said premises, and all the rents and profits thereof as guardian of these defendants, and that the said B. F. Koons, as the guardian of these defendants has, by

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clearing, ditching, and otherwise improving said premises, expended and incurred a liability for at least five hundred dollars for needed improvements and betterments of said premises, all to the knowledge of the plaintiff; that on the 22d day of February, 1879, the plaintiff obtained a divorce from her said husband Michael Ricker, and a judgment for alimony for \$800; that since her said divorce she has had the custody of these defendants up to the year 1887, at which time she intermarried with one ——— Blanton, her present husband; that during all the time she remained single she demanded and received from each of the defendants' guardian compensation for keeping and caring for said defendants; that for the last six or seven years she has regularly received compensation for keeping said children; that said defendants never had any means, other than the real estate described in the complaint, and that all payments made to her were derived from the rents of said real estate, of all of which she had full knowledge, and that in order to compensate her for keeping these defendants, for the time that she had their custody, and to make said improvements, the present guardian has anticipated the rents and profits of said premises for a number of years, in the future, to get money for that purpose. Wherefore they say the plaintiff ought not to have and maintain her action."

As the ruling on the demurrer to the complaint presents one of the questions raised by the demurrer to the fifth paragraph of answer, we will consider the two together. No question as to the statute of limitations is raised in this court by counsel on either the complaint or the answer, but the appellants insist that, as the deed was made on the 28th day of January, 1878, while this suit was not commenced until August 23d, 1887, it was incumbent on the appellee to account for the delay; that the complaint does not show when the fraud was discovered, and it will, therefore, be presumed to have been discovered at once, and that the delay in asking for relief is such laches as makes her equity

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stale and bars relief. They also say that the answer shows affirmatively that the appellee had notice soon after the deed was made of the claims made by the guardian of the children, and not alone by delay, but by her acts signified affirmance of and acquiescence in the deed as made; also, that the facts pleaded in that paragraph of answer, and by the demurrer admitted to be true, estop her from asking for a reformation of the deed.

It is also urged by appellants that the complaint, irrespective of the question of delay, does not show such facts as would justify interference by a court of equity for the reformation of the contract, for the reason, as stated in their brief, that "the complaint fails to show a mutual mistake. It fails to show any excuse for not having the deed read."

It is not alone in cases of mutual mistake that a court of equity will reform a written instrument. That relief will be granted where by the fraud of one of the parties to the instrument the language inserted in it is materially different from that agreed upon. Pomeroy Eq. Jur., section 910.

We think, also, that a sufficient excuse is shown for not having the deed read. The relations between the parties were such that, notwithstanding the husband's desertion of the wife, when he proposed to her to convey his land so that thereafter he should have no further interest in it, and that she and the children should be its sole owners, she, being unable herself to read, had a right to rely on his sincerity and on his assurances that the deed as prepared under his direction did reserve to her a life-estate, while conveying the fee to the children.

The question as to laches is much more difficult. No principle of equity jurisprudence is better established or more familiar than that "Equity aids the vigilant, not those those who slumber on their rights." This principle is designed to promote diligence on the part of suitors, to discourage laches by making it a bar to relief, and to prevent

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the enforcement of stale demands. Pomeroy Eq. Jur., section 418; Cooley Torts, star p. 504.

Among the cases in which this principle is most frequently applied are those in which the suitor seeks the rescission of a contract, or the specific performance of a contract, or in seeking relief by injunction. In such cases, acquiescence in the wrongful conduct complained of may, and often does, operate as a *quasi* estoppel, barring his right to equitable relief. What delay will render a claim stale, or will be treated as conclusive evidence of acquiescence, or will be such laches as will deny relief, must depend largely upon the special circumstances of each particular case. The statute of limitations prescribes definite periods within which certain actions must be brought or they will thereafter be barred, but the limits of excusable and of inexcusable delay, as affecting the rights to relief from a court of equity, can only be defined by general rules, admitting of many exceptions.

Courts of equity have never attempted to lay down rules, fixing any definite or specific period of delay that shall, like the statute of limitations, bar the right to equitable relief from fraud, and it is manifestly impossible for them to do so.

Generally, it is said, one must not sleep upon his rights, but must act promptly upon discovering the fraud. This is especially true when the relief sought is the rescission of a contract; and in all cases, one may not, after the discovery of the fraud, delay until the rights of innocent third parties have intervened; or even until the other party to the transaction becomes justified in believing that the fraud is condoned, and thereafter places himself in such situation that he would sustain loss if the contract were rescinded, for one may even be estopped to repudiate a fraud as against the wrong-doer.

Of the doctrine of laches, it is said by Lord SELBORNE, in the case of *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221: "The doctrine of laches in courts of equity is not

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an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other."

In discussing the effect of delay as indicating acquiescence, and estopping a party from asserting his right to equitable relief, the author of Pomeroy's Equity Jurisprudence says (section 817): "In order that this effect may be produced, the acquiescence must be with knowledge of the wrongful acts themselves, and of their injurious consequences; it must be voluntary, not the result of accident, nor of causes rendering it a physical, legal, or moral necessity, and it must last for an unreasonable length of time, so that it will be inequitable even to the wrong-doer to enforce the peculiar remedies of equity against him, after he has been suffered to go on unmolested, and his conduct apparently acquiesced in. It follows that what will amount to a sufficient acquiescence in any particular case, must largely depend upon its own special circumstances."

There are cases where silence is itself a fraud. 1 Bigelow Frauds, 590. And mere silence alone, unaccompanied by any fraudulent intent, may estop. Pomeroy Eq. Jur., section 818.

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So far as any question is presented to us on the complaint, and on the fifth paragraph of the answer, it stands admitted that the fraud was, in fact, committed, and that the appellee did, in fact, execute the deed, believing, in good faith, that it contained the clause agreed upon, securing to her the rents and profits of the land during life. The demurrer to the complaint necessarily admits this, and the answer in question, by not denying, also admits, and seeks to avoid it.

As the question is presented on the complaint it involves only the question of time. Was the delay so long that it is fatal?

The additional facts brought in by the answer, showing the appointment of the guardian, the renting by him of the land, the surrender of possession to the tenant by the appellee, the expenditure of rents in the improvement of the land, and in compensating appellee for the maintenance of the children, all tend to show knowledge by the appellee of the claim made by the guardian in behalf of the children, and tend strongly to indicate acquiescence therein. None of these facts have in them, however, any of the quality of an estoppel, save such as arises out of the apparent acquiescence of appellee in the claim of appellants. Nor is there anything in the fact that the guardian, to procure money to make said improvements, and provide for the maintenance of the children, has anticipated the rents and profits of the estate for several years in advance, which should, of itself, tend to estop her. Nor is the question affected by the fact that the money expended for the support of the children was paid to the appellee.

We think if the children had been possessed of any other estate, and their guardian had expended it, or any material part of it, in the improvement of the land, relying upon the apparent absolute ownership indicated by the deed upon its face, it would be otherwise, but the answer expressly avers that the children had no other estate. The position of appellants as indicated by their answer, then, is

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in effect this: "We admit the fraud charged by appellee, and that, in equity, if she had moved with greater promptness she would have been entitled to the correction of the deed, and to the rents and profits, but by her delay we have had the benefit of her rents and profits for many years. A portion of them our guardian has used to permanently improve and enhance the value of the fee in the land, which is all that equitably belonged to us, and with the balance he has partially provided for our support. We have not only thus appropriated to our own use all her rents and profits in the past, but have anticipated them for several years in the future, and because of her complaisance and long acquiescence in our appropriation of her property she is now estopped to claim her own." Stated thus, the equities of the appellants do not seem to be very strong.

We are inclined to think that the rule of diligence applying to an action for the rescission of a contract and that applying to an action of this character should be, and is, materially different, and that that which will be fatal laches in one case will not bar recovery in the other. Here the rights of no innocent third parties have intervened, and the grantees of the fee have not suffered, but have largely profited by the delay.

This is clearly a case where we may apply the language of Lord Selborne above quoted.

The resistance to relief which would otherwise be just is founded upon mere delay and apparent acquiescence. The validity of the defence must be tried upon principles substantially equitable. Consider the length of the delay and the acts done in the interval, and where would the balance tend of justice or of injustice in taking the one course or the other? Wherein will there be injustice or inequity done to appellants in now making the correction?

One other question is argued by the appellants on the answer. The answer alleges that after the execution of the deed the appellee was divorced from her husband and re-

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covered a judgment for \$800 alimony. As this decree settled all property rights between the husband and wife, appellants urge that the judgment for alimony bars this action. There is here no question of property rights between the husband and wife. She affirms the deed made by them and insists upon that which she says the deed equitably gives her. We conclude that the court did not err in overruling the demurrer to the complaint, or in sustaining the demurrer to the answer.

The appellants also insist that the court erred in its conclusions of law, in that it overruled their motion for a judgment in their favor on the special findings. By the error thus assigned the same questions are presented that we have considered in passing on the pleadings, and it is of course unnecessary to consider them further.

They have also assigned as error the action of the court in overruling their motion for a new trial.

They insist that the finding is not sustained by sufficient evidence. There being evidence tending to support the finding upon all material questions, we will not set it aside.

They also urge that the court erred in the manner in which questions of fact were submitted to the jury. The cause is one of equitable cognizance, and the parties were not entitled to a jury. The court, however, did, for its information, submit certain questions to a jury. Having announced its intention of so doing, the appellants insisted that before empanelling the jury the court should formulate the questions to be submitted, and that the jury should then be sworn to try the questions thus presented. This the court refused to do, but announced that after the empanelling of the jury the parties should proceed with the trial, introduce their evidence, and that the court would then, after hearing the evidence, prepare and submit to the jury such questions as it desired their advice upon, and would also allow the parties, if they desired, to prepare and submit additional questions.

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This course the court pursued over appellants' objection, and they urge it as erroneous.

While the course pursued by the court is not in accordance with the usual practice of courts of equity in the submission of questions of fact to a jury, there is no available error in it.

The verdict of the jury in such cases has no binding force on the court, and is merely advisory. The court may disregard all the jury's findings. Having formulated questions to be answered by the jury, the court may, after hearing the evidence, discharge the jury at once without a verdict, and decide the case without their advice; or, after hearing the evidence, additional questions may be submitted. The jury in such cases are not sworn to answer any specific questions, but that they will true answers return to such questions of fact as may be submitted to them by the court, according to the law and the evidence.

Appellants also complain that some of the interrogatories submitted to the jury were improper in form, and that the court did not submit to them interrogatories covering what they regard as the controlling question of fact involved in the case.

As the findings of the jury were entirely without controlling influence, it is immaterial in what form they were submitted to the jury; nor is it material how few or how many the questions actually submitted, or whether they were, or were not, controlling questions. The court made special findings of the facts, and whether he was, or was not, aided in his finding by the answers returned by the jury, his findings, and not the answers returned by the jury, are decisive of the questions of fact involved.

What we have said on this question also disposes of alleged error of the court in instructing the jury. We need not inquire whether the instructions given were right or wrong. The jury are in such cases empanelled to advise the court on questions of fact. Whether the advice they give

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is right or not, or whether they are, or are not, erroneously instructed with reference to the manner in which to reach their conclusion is not material provided the court reaches correct and just conclusions.

The court decreed the correction of the deed, and required the guardian to account for the rents collected. The guardian thereupon submitted an account showing the amounts collected and how disbursed. The court allowed him credit for all disbursements, and compensation from the same for his services, and also by the decree protected the guardian as to the rents anticipated, as averred in the answer, the amount of rent thus anticipated being shown to be the sum of \$468.98.

We find no error in the record. Substantial justice seems to have been done to all the parties by the decree.

The judgment is affirmed, with costs.

Filed April 21, 1891; petition for a rehearing overruled Mar. 12, 1892.

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No. 15,711.

SHAFFER v. SHAFFER, EXECUTOR.

WILL.—*Decedents' Estates.*—*Widow.*—*Statutory Allowance.*—*Election to Take Under the Will.*—*Effect.*—*Case Distinguished.*—Where a husband has made specific provision for his widow, and has also disposed of all his other property in such a way as to make it apparent that the assertion by the widow of the right to take both under the law and under the will would defeat the manifest purpose of the testator, she will be confined to the provisions made by the will, if she elects to take the provision made for her. *Shipman v. Keys*, 127 Ind. 353, distinguished.

From the Clark Circuit Court.

J. H. Stotsenburg and *E. B. Stotsenburg*, for appellant.

J. K. Marsh, for appellee.

COFFEY, C. J.—This was a petition by the appellant,

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Ellen Shafer, as the widow of Henry Shafer, deceased, against the appellee, David Shafer, as the executor of the will of the said Henry Shafer, for an allowance of the \$500 given to widows under the provisions of sections 2269 and 2270, R. S. 1881.

The question presented for our consideration involves the construction of the will.

By the terms of his will Henry Shafer gave to his wife, the appellant here, certain described real estate in Clark county, to be held by her during her natural life, or during her widowhood, and, also, all his personal property except money, promissory notes and choses in action. The will further provides that the executor shall invest the sum of two thousand five hundred dollars for the benefit of the appellant, and shall pay to her the interest thereon semi-annually. He gave to his children and grandchildren all the remainder of his property, and provided by his will that upon the death of the appellant the executor should sell the property bequeathed to her and divide the proceeds, together with the two thousand five hundred dollars invested for her benefit, equally among three children named in the will, or their descendants. The appellant elected to take under the will.

It will thus be seen that the will disposes of all the property owned by Henry Shafer at the time of his death.

Whatever may have been the rule of construction in this State prior to the decision in the case of *Langley v. Mayhew*, 107 Ind. 198, it is now settled that where a husband has made specific provision for his widow, and has also disposed of all his other property in such a way as to make it apparent that the assertion by the widow of the right to take both under the law and under the will would defeat the manifest purpose of the testator, she will be confined to the provisions made by the will, if she elects to take the provision made for her. *Hurley v. McIver*, 119 Ind. 53.

It is true that a testator can not dispose of the property

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which the law gives the widow by his will without her consent, yet the principle that she may waive the provision made by law, and take in lieu of it a provision made by the will of her husband, is too well settled to require the citation of authority.

In this case it was the evident intention of the testator that his children should take all his property not specifically given the appellant. In this the case is distinguished from *Shipman v. Keys*, 127 Ind. 353, where the bequest was general, and not specific.

As the appellant elected to take under the will of her husband, and as she can not take both under the will and under the law without defeating the manifest intention of the testator, we think the court did not err in refusing to allow her claim.

Judgment affirmed.

Filed Oct. 30, 1891.

No. 16,102.

WHITE v. THE BOARD OF COMMISSIONERS OF SULLIVAN
COUNTY.

COUNTY.—*Liability of for Failure of County Commissioners to Keep Jail in Healthy Condition.*—A county is not liable for the illness of a prisoner confined in its jail, caused by the failure of the county commissioners to keep the jail in a healthy condition.

From the Sullivan Circuit Court.

W. C. Hultz, for appellant.

J. T. Beasley and A. B. Williams, for appellee.

ELLIOTT, J.—The appellant alleges in his complaint that the appellee owns and controls the jail of Sullivan county; that it is required by law to keep the jail in repair; that it

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wrongfully and negligently failed to perform this duty, and suffered the jail to become damp and impure because of the noisome odors and air which emanated from a cesspool ; that no outlet was provided for the escape of such noisome odors and air ; that the wrongful breach of duty caused the appellant to become ill, and that from the illness so caused he suffered for many weeks,

The complaint does not state a cause of action against the county.

A county is one of the instrumentalities of government, and exercises delegated governmental functions. It is of very ancient origin. It was organized to give effect to the great principle of local self-government which forms such an important element of English and American liberty—which is, indeed, the vitalizing and preserving element of constitutional freedom. See authorities collected in Elliott Roads and Streets, 325. The care of the county prison is committed to the county officers in order to enable the county to discharge its duties as a governmental subdivision. The governmental power under which the care and control of prisons fall is the great one commonly called “the police power.” In caring for prisons a county exercises part of this great power, by virtue of its delegation by the Legislature to it, and it is no more liable for the wrongful or negligent acts of the officers in immediate charge of a prison than is the State for the tortious conduct of officers placed in charge of the prisons controlled by the State directly. We have not found it necessary to discuss the question before us, for the reason that it has been fully discussed in many cases. It is settled, and rightly settled, that for the negligence of officers, whose duties require an exercise of such a governmental power as the police power, neither a county nor a city is liable. Whether the wrong-doing officers are personally liable is quite another question. *Summers v. Board, etc.*, 103 Ind. 262, and authorities cited; *Pfefferle v. Board, etc.*, 39 Kan. 432; *Manuel v. Board, etc.*, 98 N. C. 9; *Watson v. Preston*, 30 W. Va.

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367; *Hollenbeck v. Winnebago*, 95 Ill. 148; *Board, etc., v. Mighels*, 7 Ohio St. 109; *Kincaid v. Hardin County*, 53 Iowa, 430; 2 *Dillon Municipal Corp.* (4th ed.), sections 957, 974.

Judgment affirmed.

Filed Oct. 13, 1891.

No. 14,787.

ESCHENBURG v. THE BOARD OF COMMISSIONERS OF LAKE
COUNTY.

TAXES.—Platted Land.—Taxation of.—Authority of County Auditor Concerning.—Where land is platted, and the plat submitted to the county auditor, as required by law, to assess and apportion the true valuation of each lot or parcel of land described in such plat, the auditor has the right, upon the presentation of the plat to him, to make an original assessment upon the lots as platted, and apportion it on the lots. His authority is not confined simply to apportioning the amount at which the land had been previously assessed as unimproved land, upon the lots as platted. See section 6392, R. S. 1881.

From the Lake Circuit Court.

J. Kopelke, for appellant.

J. W. Youche, for appellee.

OLDS, J.—The appellant was the owner of 103⁵⁴/₁₀₀ acres of unimproved land situate within the incorporate limits of the city of Hammond, in the township of North, in Lake county, which had been at the preceding valuation in the spring of 1886 assessed at \$7,000. On August 27th, 1886, appellant platted the same as an addition to the city of Hammond, and on September 14th, 1886, he submitted the plat to the county auditor, as required by law, to assess and apportion the true valuation of each lot or parcel of land described in such plat. The county auditor increased the valuation of the platted lots to the total amount of \$15,630,

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and apportioned it upon the lots as platted, and placed the said assessment as made by him upon the tax duplicate for the year 1887, and appellant was obliged to and did pay the taxes according to said assessment for the year 1887, amounting to the sum of \$287.59; that upon the valuation of \$7,000 placed upon the same as unimproved land the tax would only amount to \$127.47.

This action is brought to recover back the amount paid. It is admitted that the auditor's valuation did not exceed the full fair cash value of the lots, and that it was in accordance with the assessed value of adjacent lots and lands as fixed by the real estate assessment of 1886.

The question presented by this appeal, arising upon the overruling of the appellant's motion for a new trial, is whether or not the county auditor had the right upon the presentation of the plat to him to make an original assessment upon the lots as platted, and apportion it on the lots, or whether his authority consisted in simply apportioning the amount at which the land had been previously assessed as unimproved land, upon the lots as platted.

Section 6392, R. S. 1881, reads as follows: "Before any addition is made to any city or town, the person making the same, before such plat is recorded, shall present the same to the county auditor, who shall assess and apportion the true valuation of each lot or parcel of land described in such plat, in the same manner as other lots are valued, and thereupon such lots or parcels shall be entered on the tax list in lieu of the land included therein; but in making such valuation, regard shall be had to the next preceding sexennial valuation of real estate, so that the said lots shall, as near as practicable, be equalized with adjacent lands and lots according to such sexennial valuation."

It would seem, if this section of the statute is valid, that there can be but little doubt as to the authority of the auditor to make an original assessment of the platted property, or of the legislative intent for him to do so, for it provides

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that the county auditor "shall assess and apportion the true valuation of each lot or parcel of land described in such plat, in the same manner that other lots are valued." Other lots are assessed individually, and not by apportioning some former appraised value of the unplatted land of which they constituted a part. To say that the legislative intent was to apportion the original assessment of the unplatted ground would be to render nugatory or to strike from the statute the word "assess," and leave the statute to read, "shall apportion," etc., as fixed by the assessor upon the unplatted land at the preceding assessment. This would be a material and unwarranted change in the statute. The section expressly and clearly authorizes the county auditor to make an assessment of the lots described in the plat.

The section provides that in making such assessment the auditor shall have regard to the next preceding sexennial valuation, so that the lots shall, as near as practicable, be equalized with adjacent lands according to such preceding valuation. This is a very wise provision. The plat may not be presented until two, three or four years after the appraisement. Lands and lots may have increased in value very materially, and in making the appraisement the auditor shall have regard to the preceding appraisement, so as to equalize the value of the lots with the adjacent lots and lands. Although their cash value at the time may be far in excess of such value and the value of adjacent property at the time of the preceding appraisement, the auditor shall only assess it at a value that will correspond to the value placed upon adjacent lots. The auditor shall assess and apportion such lots at their true value as compared with the value placed upon adjacent lots. Such an assessment works no injustice to the owner.

It is suggested by counsel that, under our Constitution and laws, real estate must be appraised every six years, and that the appraisements are then equalized by the boards of equalization, and if an appraisement of platted lots is permitted

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to be made by the county auditor, the owner is deprived of any right to be heard or his lands appraised as the lands of others are.

The owner of land at the time the sexennial appraisal is made has his land assessed as the lands of others are assessed, and has the same board of equalization to change and reduce his assessment if too high. He is not compelled to plat his land. If he does so, it is voluntary, and he must comply with the provisions of the statute. In platting his land, he is required by section 6392 to present his plat to the county auditor, and submit to an assessment and apportionment to be made by the auditor, as required by said section. No notice is required, for the statute requires that the person platting the lands shall present the plat to the auditor for the purpose of an assessment and apportionment. The person has notice when he presents his plat to the auditor that the assessment will be made. It is a voluntary act on the part of the owner of the lands. He can leave his lands in a body, unplatted, and have the benefit of the assessment made by the assessor, as approved and confirmed by the board of equalization, or he can plat his lands, and present the plat to the county auditor, and submit to an assessment by him.

There is no error in the record.

Judgment affirmed, with costs.

Filed Oct. 30, 1891.

No. 15,272.

THE PENNSYLVANIA COMPANY v. NEWMAYER.

EVIDENCE.—Railroad.—Action for Injuries.—Intoxication of Engineer.—How May be Shown.—In an action against a railroad company for damages for injuries received in an accident, it is proper to show, in support of an allegation in the complaint that the employees in charge of the train were intoxicated at the time of said injury, that the engineer on said train was in the habit of drinking intoxicating liquor, and of visiting

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a certain saloon, evidence having been introduced tending to prove that he had drank intoxicating liquor at the last station passed by the train before the injury, and about thirty minutes before the accident.

SAME.—Unproved Fact.—Question Assuming Existence of.—Impropriety of Cross-Examination.—Control of Court Over.—A question propounded to a witness is improper if it assumes the existence of a fact not proved or admitted. This applies to cross-examination. The extent to which a cross-examination may be carried is largely under the discretion of the trial court, and a cause will not be reversed for the exercise of such discretion, unless it appears that there has been an abuse of the discretion to the injury of the party complaining.

SAME.—Mental Condition of Party.—Non-Expert Witness.—A witness who is not an expert will not be permitted to give an opinion as to the mental condition of another, without first stating the facts upon which the opinion is based.

SAME.—Immaterial Question.—Where a question is asked of a witness, the answer to which is immaterial under the issues in the case, error can not be predicated upon the refusal of the court to permit the question to be asked.

EXAMINATION OF PERSON.—Party not Required to Submit to.—Medical Experts.—In the absence of a statute authorizing it, and none exists in this State, a party to an action is not required to submit his person to an examination of his injuries by surgeons appointed by the court for that purpose.

INSTRUCTIONS TO JURY.—Railroad.—Action for Personal Injuries.—Speed of Trains.—Abstract Instruction as to.—In an action against a railroad company for damages for personal injuries, it is not error to refuse to instruct the jury broadly that "A railroad company has a right to propel its trains over its road at a reasonable rate of speed, and when its track is in a good and safe condition, and the cars properly equipped and in safe condition, except as to latent defects, which by the highest degree of skill and care could not be discovered, it would not be negligence *per se* to run the train at a rate of speed of forty miles an hour."

RAILROAD.—Passenger on Freight Train.—Increased Risk.—Obligation of Railroad Company.—Whoever takes passage upon a freight train assumes the increased risk incident to the operation and management of such a train. When a railroad company does, however, accept passengers on its freight trains, it becomes bound by all the obligations of a common carrier of passengers upon a regular passenger train.

From the Owen Circuit Court.

S. O. Pickens, for appellant.

D. E. Beem and *W. Hickam*, for appellee.

COFFEY, C. J.—In the month of May, 1888, the appellee,

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Newmeyer, shipped a car load of hogs from the town of Freedom, a station on the Indianapolis and Vincennes Railroad, to the city of Indianapolis. To accompany the hogs, he took passage in the caboose attached to the freight train in which the hogs were shipped. About two miles east of the station from which the hogs were shipped, the caboose in which the appellee was riding, and several other cars, were thrown from the track by reason of a broken axle under one of the freight cars, and thereby the appellee was injured.

The complaint charges, among other things, that the railroad track was negligently permitted to get out of repair and to become irregular, unlevel and to contain rotten ties, and that the train in which appellee was riding was negligently and carelessly run at a great and unusual rate of speed; that the cars in the train were old and defective, and that the employees in charge of the train were at the time of said injury intoxicated.

A trial of the cause resulted in a verdict and judgment for the appellee, from which this appeal is prosecuted.

The appellant assigns as error that the circuit court erred in overruling the motion for a new trial.

Many reasons were assigned in the motion for a new trial, but such reasons as have not been discussed in the brief of appellant must be regarded as waived. We will consider those discussed in the order in which they are presented.

On the trial of the cause the appellee propounded to one Stultz, a witness called by him, the following question: "You speak about Mr. Ryan being in that saloon before. How frequently had you seen him in that saloon before that time?"

To this question the appellant objected, on the ground, as stated to the court, that the evidence sought to be elicited was immaterial, and would not in any way tend to prove any of the matters in issue, but the court overruled the objection, and the witness answered: "I did not stay there all

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the time myself. I have seen him there several times. When he went down, pretty nearly every time the train would stop there, he would come in."

It had been shown that Ryan was the engineer in charge of the engine at the time the injury sued for occurred; and there was also evidence tending to prove that he had drank intoxicating liquor at Freedom, the last station passed by the train before the injury, and about thirty minutes before the accident.

We think the evidence was admissible as tending to prove the allegation that those in charge of the train were intoxicated at the time of the accident. The fact that Ryan, the engineer, was in the habit of drinking intoxicating liquor, and of visiting this saloon, if such was the fact, was proper to be considered by the jury, in connection with the other evidence in the cause, as tending to sustain the charge of intoxication.

Evidence that he was a teetotaler would have been competent on behalf of the appellant, as rebutting the charge of intoxication, and we think proof that he was in the habit of drinking, in connection with proof that he had been drinking intoxicating liquor within thirty minutes of the time the accident occurred, was admissible to prove the converse.

One Hicks, a witness called by the appellee, testified on his examination in chief that he was engaged as a laborer with the section gang upon the railroad near the place where the accident occurred, and was standing near the railroad track shortly before its occurrence, and that his attention was directed to the speed of the train immediately before the accident.

On cross-examination the appellant asked him this question:

"I will ask you to state to the jury what the speed of that train was as it passed you with reference to the speed ordinarily run there by the trains?"

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The court sustained an objection to this question, on the ground that it was not cross-examination.

In addition to the objection that this was not strictly cross-examination, the question was subject to the further infirmity that it assumed a fact not proven or admitted, namely, that the witness had seen and had observed the speed of other trains at the same place. A question propounded to a witness should not assume the existence of a fact not proven or admitted.

An eminent writer on the law of evidence says: "Although upon cross-examination a counsel may put leading questions, those questions must not assume facts to have been proved which have not been proved, or that particular answers have been given contrary to the facts." Starkie Evidence (10th ed.), section 197.

Furthermore, the extent to which a cross-examination may be carried is largely under the discretion of the trial court, and a cause will not be reversed for the exercise of such discretion unless it appears that there has been an abuse of the discretion to the injury of the party complaining.

We do not think the court erred in sustaining an objection to this question.

It was in evidence that the appellee took several drinks of intoxicating liquor at Freedom shortly before he entered the train upon which he was injured. The physician who dressed his wounds near the depot at Spencer testified that the appellee did not appear to be entirely at himself, mentally, and that he was in a somewhat dazed condition of mind, and that during the time his wound was being dressed he took one or more drinks of liquor. It was also in proof that one Yockey brought him one of the drinks. A dispute having arisen as to whether one of the drinks procured at the saloon near the depot at Spencer by Yockey was for the appellee, the appellant propounded to the saloon-keeper the following question:

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"State what was said by Mr. Yockey when he came after the brandy, with reference to whom it was for?"

Upon objection by the appellee the court refused to allow the witness to answer the question.

Assuming that what Yockey said at the time he procured the liquor was admissible in evidence as explanatory of the act of procuring it, we are unable to perceive its materiality. If the appellee drank the liquor, the question as to who procured it for him was wholly immaterial.

If the parties disputed about an immaterial matter the court was under no obligation to consume time in hearing evidence as to who was correct in such immaterial matter. If the matter then in dispute was material, such materiality does not appear from the record before us, and we must presume in favor of the correctness of the ruling of the circuit court.

The appellee testified, on his own behalf, that after receiving the injury for which he sues he did not recover entire consciousness until he reached Brooklyn Station, on his way to Indianapolis.

To rebut this testimony the appellant introduced one Lawson as a witness on its behalf, and after proving by him that he entered the passenger train at Spencer, and met the appellee on his way to Indianapolis a few hours after the accident, and between Spencer and the next station east had a conversation with him in relation to his injuries, thereupon the appellant propounded to the witness the following question :

"State whether or not he appeared conscious of what he was talking about?"

The court sustained an objection to this question.

It is a rule, too familiar to call for citation, that a witness who is not an expert will not be permitted to give an opinion as to the mental condition of another without first stating the facts upon which the opinion is based.

After stating the facts as a basis for an opinion, the ques-

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tion should be so framed as to call for an opinion based upon such facts. *Staser v. Hogan*, 120 Ind. 207.

The question here does not conform to this rule, and for that reason the ruling of the court, in sustaining the objection thereto, was not erroneous.

The appellant, at the proper time, prayed the court to give to the jury the following instruction, namely: "A railroad company has a right to propel its trains over its road at a reasonable rate of speed, and when its track is in a good and safe condition, and the cars properly equipped and in safe condition, except as to latent defects, which by the highest degree of skill and care could not be discovered, it would not be negligence *per se* to run the train at a rate of speed of forty miles an hour."

The court refused to give this instruction as asked, but modified the same by adding thereto: "Provided that under all the circumstances of a given case such rate of speed was reasonable and a safe one," and gave the instruction as modified.

The appellant also asked the court to instruct the jury as follows:

"A railroad company has the right to set aside certain of its trains for carrying passengers, and certain others for the transportation of freight. So if you find from the evidence in this cause that the train upon which the plaintiff was riding at the time he received the injury in question was a freight train set apart for the transportation of freight exclusively, being composed exclusively of freight cars and caboose attached for the accommodation of the train employees and such persons as might desire to attend and take care of live stock being transported in such trains, of which regulation the plaintiff had knowledge, and that plaintiff was being carried on said train as an attendant upon and to feed, water and care for the car load of hogs which he was shipping by said train, not having paid any fare for so being carried, then, as to the plaintiff, the defendant was not re-

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quired to exercise that high degree of care and skill with reference to the equipment, operation and management of said train as was required of it with reference to the equipment, operation and management of its passenger trains."

This instruction the court refused to give as asked, and modified the same by adding thereto the words: "But if you find from the evidence that the defendant did receive and undertake to carry the plaintiff upon its freight train, as a passenger, it will be bound by all the obligations of a common carrier of passengers upon a regular passenger train," and gave the same as modified.

The first instruction above set out, as asked by the appellant, states a mere abstract principle of law. Whether it would be correct as applied to a passenger train we need not stop to inquire, for we are here dealing with an injury received upon a freight train. The instruction assumes that when the track is in good and safe condition, and the cars properly equipped and in safe condition, except as to latent defects which by the highest degree of skill and care could not be discovered, no circumstances could exist which would render the speed of forty miles an hour negligence *per se*. No authority supporting this position, as applied to freight trains, has been furnished us, and we know of none. We think many circumstances might exist, even where the track was in good and safe condition, and the cars properly equipped, which would render such a rate of speed negligence. The train might be of unusual size, the cars improperly loaded, or loaded beyond their capacity, or there might be at the particular place danger of collisions with stock because the track was not fenced, or danger of collisions with teams at crossing on account of the absence of warnings, or many other circumstances which would render it imprudent and unsafe to run a freight train at such a rate of speed. The evidence in the cause is not before us and we are not, therefore, in a condition to know the circumstances surrounding this particular case. There may have

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been evidence in the cause which rendered the modification made by the court necessary, in order to make the instruction applicable to the case as made by the evidence in the cause.

In *Shearman and Redfield on the Law of Negligence* it is said: "The proper test, therefore, with respect to the speed at which a train was run, is to inquire whether the condition of the track and equipment, the protection afforded to travellers by fencing the track from adjoining highways, or suitable warnings against danger, and similar circumstances, were such as to make that speed consistent with prudence." 2 *Shearman and Redfield Law of Negligence* (4th ed.), section 460.

This, we think, is the true rule, whether applied to freight or passenger trains, and under it the instruction as asked was erroneous, and the court did not err in modifying the same before giving it to the jury.

Nor do we think the court erred in modifying the second instruction above set out, in the manner it did so modify it.

It is true that whoever takes passage upon a freight train assumes the increased risk incident to the operation and management of such a train, and the court so instructed the jury in this case; but while this is true, when a railroad company does accept passengers on its freight trains, it becomes bound by all the obligations of a common carrier of passengers upon a regular passenger train. *Ohio, etc., R. W. Co. v. Dickerson*, 59 Ind. 317, and authorities cited.

We have carefully read the instructions given by the court in this case, and think they state the law correctly. They cover all instructions asked by the appellant and refused by the court, except those we have set out and considered.

Finally, it is contended by the appellant that the circuit court erred in refusing to require the appellee to submit

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to an examination of his injuries by surgeons appointed by the court for that purpose.

The question here presented is one upon which the authorities are not entirely agreed. There are many cases which hold that the court may, in the exercise of a sound discretion, upon seasonable application, require the plaintiff to submit his person to a reasonable examination by competent physicians and surgeons, when necessary, to ascertain the nature, extent, and permanency of his injuries. *White v. Milwaukee, etc., R. W. Co.*, 61 Wis. 536; *Atchison, etc., R. R. Co. v. Thul*, 29 Kan. 466; *Schroeder v. Chicago, etc., R. W. Co.*, 47 Iowa, 375.

On the other hand, there are numerous authorities holding that in the absence of a statute upon the subject the courts do not possess the power to order and compel such examination. *Stuart v. Havens*, 17 Neb. 211; *Sioux City, etc., R. R. Co. v. Finlayson*, 16 Neb. 578; *Parker v. Enslow*, 102 Ill. 272; *Neuman v. Third Avenue R. R. Co.*, 50 N. Y. Super. Ct. 412; *Roberts v. Ogdenburgh, etc., R. R. Co.*, 29 Hun, 154.

It will be seen from an examination of the authorities above cited, that the question before us is one not free from difficulty, and one upon which eminent jurists entertain widely different views. In the case of *Kern v. Bridwell*, 119 Ind. 226, the power of the court to make and enforce such an order was denied. In the case of *Hess v. Lowrey*, 122 Ind. 225, it was held that an application made by the defendant after the close of the plaintiff's evidence, where no reason was given for the delay, came too late. As no proper application for such an order was made in that case, the question as to whether the court possessed the power to make the order did not arise, and what is said upon that subject is *obiter*, and does not possess the force of a binding adjudication.

In the case of *Terre Haute, etc., R. R. Co. v. Brunker*, 128 Ind. 542, it was also held that the application came too late.

The Pennsylvania Company v. Newmeyer.

In the case of *Union Pacific R. W. Co. v. Botsford*, 141 U. S. 250, the sole question presented for the consideration of the Supreme Court of the United States was the question of the legal right and power of the court trying the cause to make and enforce an order compelling the plaintiff to submit to an examination with a view of ascertaining the nature, extent and permanency of the injuries on account of which damages were sought. After a careful examination of the authorities upon the subject it was held that the court, under the common law, did not possess the power and legal right to order and enforce such an examination. In that case Mr. Justice GRAY, speaking for the court, said: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. * * * The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country."

There is no statute in this State conferring upon the circuit court the power to make such an order as was asked in this case. If such power exists it is a power that inheres in the court, independent of any statutory provision. It is applicable alike to all, male and female, and is confined to an examination of no particular part of the person. To say that the power rests in the sound discretion of the court does not meet the case, for the real question is as to whether

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the power exists at all. So far as we know, the courts of this State have never attempted to exercise such a power, and we are of the opinion that no such power is inherent in the courts. We think the better reason is against the existence of such a right, and, in the absence of some statute upon the subject, we do not think the courts should attempt to compel litigants, against their will, to submit their persons to the examination of strangers for the purpose of furnishing evidence to be used on the trial of a cause. Should a litigant willingly submit, there could be no legal objection to such an examination, and should he refuse to submit to a reasonable examination his conduct might possibly be proper matter for comment, but this is quite a different matter from compelling him, against his will, to submit his person to the examination of strangers.

In our opinion the court did not err in refusing the application in this case.

Judgment affirmed.

Filed Oct. 28, 1891.

 No. 13,216.

LA FOLLETTE v. HIGGINS.

SPECIAL FINDING.—*Power of Court to Amend.*—The court has no power to amend or alter its special finding after the same has been announced and filed.

VENIRE DE NOVO.—*Motion for.*—*When Sustained.*—A motion for a *venire de novo*, in case of a special finding of facts, can be sustained only when such finding is defective in form.

SUPREME COURT.—*Finding of Facts.*—*Weight of Evidence.*—Where there is sufficient evidence to support the finding of facts the Supreme Court will not weigh the evidence on appeal.

GUARDIAN AND WARD.—*Accounting by Guardian.*—*Failure to Make Inventory or File Reports when Due.*—*Final Settlement.*—*When will not be set Aside.*—The Supreme Court will not reverse the judgment of the circuit court declining to set aside the final settlement of a guardian on account of

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irregularities in the execution of the trust, such as failing to make an inventory of the ward's property in the proper form, and to file his reports on the day they were due, and depositing some of the money when received with his own in bank, where it appears that the guardian honestly discharged his duties and accounted for all the money and property due the ward, together with interest, and filed with his final report receipts in full signed by the ward after becoming of age.

From the Boone Circuit Court.

C. S. Wesner and *H. M. La Follette*, for appellant.

J. E. McDonald, J. M. Butler, A. L. Mason, R. W. Harrison and *B. S. Higgins*, for appellee.

OLDS, J.—This is an action by the appellant to set aside the final settlement report of John Higgins, the appellee, as guardian of the minor heirs of Harvey M. La Follette, deceased, of which heirs appellant is one.

The appellee answered in two paragraphs, one in estoppel, alleging the giving of a receipt in full of account by the appellant after he arrived at his majority, and the other in denial.

There was a trial by the court, and, on proper request, the court made a special finding of facts, stated its conclusions of law, and rendered final judgment for the appellee.

The court found the facts to be as follows:

"On the 10th day of November, 1865, John Higgins, the defendant, was by the clerk of the common pleas court of Boone county, Indiana, appointed guardian of the heirs of Harvey M. La Follette, deceased, six in number, among whom was the plaintiff, which appointment was confirmed by the said common pleas court on the 1st day of January, 1866. Said defendant filed no inventory of the property of any of his said wards, including said plaintiff, at any time. At the date of said appointment said plaintiff owned his share of the personal estate of his father, in the hands of the administrator of the estate, and also the undivided one-ninth of realty in Thorntown, in said county, in which property the widow of said decedent and his family then lived,

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and on which said widow and members of said family have ever since lived, and the property having been used for a homestead, no rents therefrom have ever been received by said defendant. The plaintiff was also the owner of an interest in said property, which was afterwards sold by the administrator, and whatever came to the hands of said defendant as the proceeds of the sale of this property has been accounted for by him in his reports. On the 26th day of January, 1868, said defendant filed his first report as guardian, which was general as to all the heirs for whom he was guardian, and he did not separate the interest of the plaintiff from the others. In this report he charges himself as follows (August 3d, 1866): The proceeds of the mill from November 10th, 1866, to June 1st, 1867; \$1,197.26; January 6th, 1867, received of Mote, administrator, one note on R. H. La Follette, \$627.35; January 6th, 1867, received of Mote, cash, \$776.49; January 20th, 1867, received of S. A. Lee, clerk, cash, \$1,382.60; January 31st, 1868, received of Mote, administrator, \$1,940.23; received of Mote, administrator, \$28.97; interest, \$167.

"In this report the undisputed credits are \$149.13. The guardian charged \$100. The theory upon which interest is accounted for in the defendant's reports was to charge himself with interest which had been received, and not with interest accrued and not paid. Plaintiff's share of the principal was \$992.15; his share of interest was \$27.83—\$1,019.98; his share of credits, including guardian's charges, \$41.52, leaving \$978.46.

"Interest accounted for in second report: January 17th, 1870, \$120.93, making \$1,099.39 credits in this report not disputed; plaintiff's share, \$19.88, leaving \$1,079.51; one-sixth interest accounted for in third report, January 15th, 1873, \$205.73, making \$1,285.26; one-sixth of undisputed credits, \$89.82; one-sixth of guardian's charges, \$6.33, making \$96.15, and leaving \$1,189.11; one-sixth of interest accounted for in fourth report, April 19th, 1875, \$190.18, mak-

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ing \$1,379.29; one-sixth of undisputed credits, \$35.93; one-sixth of guardian's charges, \$22.88 = \$58.76, leaving \$1,320.53; one-sixth of interest accounted for in fifth report, January 28th, 1876, \$90.44, making \$1,410.97; one-sixth of undisputed credits, \$75.63; one-sixth of guardian's charges, \$3.66, making \$79.29, leaving \$1,331.68.

"In this report final settlement was made with one of the wards; one-fifth of interest accounted for in sixth report, April 13th, 1877, \$141.98, making \$1,473.66; one-fifth of undisputed credits, \$37.13; one-fifth of guardian's charges, \$8.50, making \$45.63, and leaving \$1,428.03.

"In this report, after reporting generally as to the five, there is a separation of the account, and William L. is charged with Susan C. La Follette receipt No. 44, \$50, leaving \$1,378.03. The seventh report is as to Warren J. alone. The eighth report is separate. April 18th, 1879, interest, \$192.78, making \$1,570.81; credits, without guardian's charges, \$248.98; add guardian's charges, \$22—270.98, making \$1,299.83. The ninth report is final as to Harvey M. La Follette, and relates to him alone. Interest charged in tenth report, July 9th, 1881, \$155.12, making \$1,454.95; undisputed credits, \$79.65; guardian's charges, \$28; voucher 89½ incorrect, \$50; interest, \$2.50; incorrect and never corrected, \$2.50, making \$160.15, and leaving \$1,294.80. The eleventh report is as to Grant alone.

"The twelfth and final report as to plaintiff charges back to the defendant voucher 89½, \$50, but not the interest, \$2.50, and also accounts for interest \$26.88—\$76.88, \$1,204.80, \$1,381.68; undisputed credits, \$13.85; guardian's charges, \$7, making \$20.85, and leaving \$1,360.83. The twelfth report, as numbered, was filed February 8, 1883. With this report were the following vouchers, executed by the ward or by his authority, and the money paid to him, or his agent: 1st. I, William L. La Follette, as an heir of Harvey M. La Follette, deceased, hereby acknowledge the receipt of the sum of \$1,299.68 in full of all demands due me from John

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Higgins, my guardian, and I hereby represent, that on the 30th day of November, 1881, I arrived at the age of twenty-one years. In witness whereof, I have hereunto subscribed my name, this 10th day of January, 1882.

“WILLIAM L. LA FOLLETTE.”

“2d. I, William L. La Follette, as an heir of Harvey M. La Follette, deceased, hereby acknowledge the receipt of (\$51) fifty-one dollars in full of all demands due me from John Higgins, my guardian, and I hereby represent that on the 30th day of November, 1881, I arrived at the age of twenty-one years. In witness whereof I have hereunto subscribed my name this 28th day of March, 1882.

“WM. L. LA FOLLETTE.”

“From the foregoing the defendant received of his ward's money, August 3d, 1866, \$199.54, January, 1867, \$464.40, January, 1868, \$328.20, making \$992.15; he accounted for interest, \$1,151.89, making \$2,144.04; his credits amounted to \$790.71; he paid his ward January 10th, 1882, \$1,299.68; he paid his ward March 28th, 1882, \$51, making \$2,141.39, leaving \$2.65, which is \$2.50 not credited back, as hereinbefore found, where it should have been, and 15 cents probably growing out of the difference in calculations. The money was loaned at different rates of interest, mostly at ten per cent. At times some portion was deposited in the National Bank of Thorntown in his individual name and with other funds belonging to him in the same account, and he was an ordinary business man, but all of the money received by the defendant was not so deposited at the date of its reception. There is no proof of any failure of the defendant to account for interest, and he substantially accounted for all the money he received. The defendant did not, as shown by the dates of the reports heretofore filed, file his reports regularly every two years. At the time the plaintiff became of age, which was November 30th, 1881, and until after the signing of his receipt, he resided in Washington Territory. He executed a power of attorney, appointing one of his brothers to re-

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ceive his money then in the hands of this defendant. The attorney in fact examined the reports and objected to voucher 89½ in the tenth report as incorrect; no settlement was made. The receipt of plaintiff himself of date January 10th, 1882, was taken by the defendant for \$1,299.68, and money paid. Afterwards the defendant discovered the mistake in voucher 89½ aforesaid, paid \$51, being the amount of voucher 89½ aforesaid, and \$1 as interest, and took plaintiff's receipt, but the defendant failed to correct the charge of \$2.50 in said report credited to him for interest on said erroneous credit. The defendant managed the affairs of his trust with reasonable prudence. At times money was on hands producing no interest, but in what particular sums, or for what particular times, the evidence does not disclose."

Here follows a finding as to a voucher for \$100 January 7th, 1868, for running the mill; that there was an error in the statement of the account for services; that services to the amount were rendered, and a general finding that the guardian's charges in managing the trust as to this plaintiff are reasonable.

As conclusions of law the court states "that the plaintiff is not entitled to recover in this action, and that the defendant recover from the plaintiff his costs in this behalf."

The special finding of facts and conclusions of law were filed by the court on the 25th judicial day of the January term, 1886, of the Boone Circuit Court. The appellant at the time excepted to the conclusions of law. The next step taken in the cause was on the forty-second day of the same term of court, when the appellant filed a motion to amend the special finding of facts in numerous particulars. The court sustained the motion in one particular, viz.: "By inserting after the words 'The National Bank of Thorntown,' in the finding, the words 'in his individual name, and with other funds belonging to him in the same account, and he was an ordinary business man,'" and overruled the motion in all

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other particulars. This ruling is assigned as error by the appellant.

There was no error in this ruling that is available for the appellant. The court had no power after the special finding had been announced and filed to amend or alter the same. *Clark v. State, ex rel.*, 125 Ind. 1; *Hartlepp v. Whitely*, *post*, p. 576.

The appellant then moved for a *venire de novo*, which was overruled, and he then moved for judgment in his favor on the special finding of facts, which was also overruled. The appellant then filed a motion for a new trial and the court overruled the same. To these several rulings of the court the appellant at the time excepted, and assigned such rulings as error.

We have set out the special finding in full, except the detail as to one voucher, and having done so we need not discuss the question arising on the overruling of the motion for a *venire de novo*. There are certainly no defects in the finding which would authorize the sustaining of such a motion. A motion for a *venire de novo*, if it be a proper motion in case of a special finding of facts, can only be sustained when such finding is defective in form. Such a motion is properly made and sustained when the verdict of a jury is defective in form, and reaches such defects as are apparent on the face of the record. *Dolan v. State*, 122 Ind. 141; *Mitchell v. Friedley*, 126 Ind. 545; *Dockerty v. Hutson*, 125 Ind. 102.

The finding of facts in this case, while not as succinct as it might have been, yet shows that the appellee had faithfully and honestly discharged the duties of his trust, and accounted for all the money he had received belonging to his ward, the appellant, and for all interest shown to have been collected by him upon money loaned. After the ward arrived at the age of twenty-one years the appellee paid over to the appellant the amount in the hands of the appellee belonging to the appellant, and took appellant's receipt for the

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same. Thereafter the appellee filed his report, together with the receipts of the appellant, and his report was approved. This action is brought to set that report aside.

The appellant is not entitled to recover and have the report set aside unless he makes it appear that some substantial reason exists why it should be. If it should appear from the facts that the guardian had failed to make an inventory to the court in form as contemplated by the statute, or that he had failed to file his report, or reports, at the particular time they were due to be filed, or if in taking a voucher there was an error in the statement as to what it was given for, as if it was stated in the voucher to be for work upon the farm by the guardian, when it was in fact for work upon a mill, or other work, for which the ward was liable to pay, and the amount is correct, and, notwithstanding all these irregularities, it appears that the guardian has faithfully and honestly discharged the duties of his trust and accounted to the ward for all the money and property, and for the interest and use of the same, and made final report of the same, which has been approved, and the ward has in no way been substantially injured by such irregularities, then no reason exists why such final report should be set aside. The ward has not been harmed. The guardian has nothing which belongs to the ward, and no good purpose can be subserved by setting aside such final settlement.

Under the facts found by the court in this case the appellant was not entitled to a judgment in his favor. The facts found simply show that the guardian failed to file an inventory and to file his reports upon the day they were due, and he deposited some of the money when received with his own in bank; but the finding shows that he accounted for all the money and all the interest collected.

It does not appear from the finding that he could have loaned money at any time when he had it on hands, and that he refused to do so, or that he had money on hands unloaned for any length of time.

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It does not appear that the guardian is indebted to the ward in any sum except it may be in a very trivial amount, and the ward had receipted to him in full, and upon such receipts the final report was based and approved. There was no error in overruling appellant's motion for judgment in his favor on the special finding of facts.

The only question presented by the motion for a new trial is as to the sufficiency of the evidence to support the finding of facts.

There is sufficient evidence to support the finding of facts. Where there is evidence tending to support a finding this court will not weigh the evidence.

Numerous and able briefs have been filed on behalf of the appellant, and we have considered the theories presented by counsel. Many of the reasons urged by counsel for a reversal of the judgment are on account of irregularities, and not on account of any substantial injustice done to the appellant, or injustice suffered by him on account of such irregularities.

It is apparent from the record that the ward fared as well, notwithstanding such irregularities, as he would have done if there had been a strict compliance with the letter of the statute.

The statute, section 2403, R. S. 1881, provides that final settlements of estates, or so much thereof as affects the party adversely, may be set aside. It is certainly not intended that final settlements, either of estates or guardianship, should be set aside, unless the person seeking to have them set aside has been injuriously affected by the acts of the executor, administrator or guardian, whose report has been approved.

Section 398, R. S. 1881, provides that this court shall disregard any error which does not affect the substantial rights of the adverse party, and no judgment can be reversed or affected by reason of errors or defects not affecting the substantial rights of the parties.

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The ward in this case was entitled to have the guardianship faithfully and honestly administered, and to have the guardian account to him for all money received belonging to the ward, together with all interest collected on the same by keeping the same loaned as much of the time as it could be by the exercise of reasonable diligence on the part of the guardian. This has been done.

The mingling of the ward's money with that of the guardian, if the guardian has fully accounted for all the money of the ward and the interest thereon, does not operate injuriously to the ward; he is in just as good position as he would have been had the money not been so mingled. If the guardian fail to file a report the day it be due, but afterwards does file a report and accounts for all that be due a ward, and the report be approved, such action of the guardian and court do not affect the ward adversely or operate to his injury to such an extent as to require the reversal of a judgment refusing to set aside the final settlement report on account of such failure or irregularities.

On examination of this case we are satisfied that substantial justice was done by the judgment of the circuit court.

It is true, the statute subjects the guardian to certain penalties for the failure to comply with the letter of the statute in administering his trust, but when the guardian has executed his trust faithfully and honestly, and has accounted to his ward for all money received by him, together with all interest due the ward, and the ward after his arrival at twenty-one years of age has receipted in full to the guardian, and the guardian has submitted his final report to the court, together with the receipts of the ward and it has been approved, this court will not reverse a judgment of the circuit court declining to set aside such final settlement on account of mere irregularities in the execution of the trust.

Judgment affirmed, with costs.

Filed Oct. 27, 1891.

Robertson v. Smith et al.

No. 14,774.

ROBERTSON v. SMITH ET AL.

INJUNCTION.—Action Upon Bond.—Invalidity of Bond.—When Injunction Plaintiff Estopped from Asserting.—When a plaintiff files a complaint and bond, and procures an injunction to issue from a court of general jurisdiction, he is, when sued upon the bond, estopped to say that the court granting the injunction was without jurisdiction of the person of the defendant, and that therefore the bond is invalid, and no suit can be maintained upon it. *Jenkins v. Parkhill*, 25 Ind. 473, distinguished.

SAME.—Recovery Upon Bond.—Measure of.—Attorney's Fees.—In a suit upon an injunction bond, where it is shown that the suit in which the bond was filed asked relief other than an injunction, it is proper to allow attorney's fees, and like expenses, in so far as it relates to services rendered in resisting the making of the injunction, or in procuring its dissolution, although other matters may be involved in the litigation.

From the Marion Superior Court.

W. H. H. Miller, F. Winter and J. B. Elam, for appellant.

T. L. Sullivan, A. Q. Jones and A. C. Harris, for appellees.

MILLER, J.—The appellee Smith brought an action against the appellant in the Marion Circuit Court, in which he asked an injunction. In connection with the complaint a bond was filed by the appellees by which they obligated themselves to the defendant in the action for the payment of all damages and costs which might accrue by reason of the injunction or restraining order prayed for. Upon a hearing the court awarded an injunction until the further order of the court. The cause was appealed to this court, the judgment reversed and cause remanded, with instructions to the circuit court to dissolve the restraining order. *Robertson v. State, ex rel.*, 109 Ind. 79.

This action is upon the injunction bond to recover attorney's fees and other expenses incident to resisting the application for the injunction and procuring its dissolution.

The sole question in the case arises out of the ruling of

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the court in overruling the demurrer to the third and fourth paragraphs of the answer. The fourth paragraph of answer is as follows:

“Fourth Paragraph: The defendants, for a further answer to plaintiff’s complaint herein, say that they admit the execution of the bond or undertaking sued on in this cause, and of the granting of the injunction by said circuit court, as set out in said complaint, but defendant say that said circuit court had no jurisdiction over the person of said Robertson in said suit of Smith v. Robertson, and that the granting of said injunction was void, and that by reason thereof said bond or undertaking now sued on herein became and was wholly invalid.”

The third paragraph is, in substance, the same, except that in addition to the facts set out in the first paragraph it avers that the sole object of the suit was not for the purpose of obtaining an injunction, but was for that and other relief, and that the expense and attorney’s fees were, in part, incurred on account of the other relief sought in the action, and, therefore, not recoverable in this action.

The position of the appellees, who executed the injunction bond upon which the order was obtained, is that the bond is invalid, and that no recovery can be had upon it by the party against whom the injunction was granted, because the court had no jurisdiction over the person of the defendant.

While the appellant claims that having been brought into court and an injunction obtained, wrongfully, against him, he had a right to have it dissolved by the court, and that for his attorney’s fees and other necessary expenses in so doing he has a cause of action upon the bond.

As the positions assumed by the counsel for both parties are in harmony upon the question of the want of jurisdiction in the circuit court to grant the injunction, and that the defendant in that action might have disregarded and treated it as absolutely void, we need not stop to discuss these matters.

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The question we must determine is whether the defendant in such action had the right to resist the making of the order and to apply to the courts for its dissolution, and after having successfully done so hold the plaintiff upon his bond for the necessary expense incurred in the proceeding.

If the contention of the appellees is the correct one, the position of a party against whom an injunction has been granted by a court of general jurisdiction is an embarrassing one. He must determine for himself whether the court has jurisdiction to make the order. If, in addition to the propositions of law involved, there are disputes concerning the place of his domicile, he must, at his peril, determine how that question of law and fact will ultimately be decided. If he concludes that the court has not jurisdiction, and disobeys its order, he will be fined and imprisoned for contempt. If, on the other hand, he concludes to obey the order, and leave it to the courts to determine the question of its validity, then, however much he may be injured by it, he has no remedy.

We have arrived at the conclusion that neither reason nor the weight of authority will compel a party litigant to occupy this anomalous position.

An injunction can not be granted without a bond. The agreement in the bond to pay damages resulting from it is clear and explicit. Damages must, from the nature of the case, result if the defendant is restrained from doing that which he has a right to do. He must resist the order, and must, by himself or counsel, defend himself against proceedings for contempt. He can not go his way as though no such order had been granted, however invalid and unauthorized it may be. It can not fairly be said that he has an election to disregard the order, for he is put in a position where he must vindicate his rights, one way or another, before a court.

This being true, it would seem remarkable that he should be required to do this at his own expense, when there is a

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bond given for the very purpose of protecting him from the wrongful action of the court.

This view of the law is taken in *Walton v. Develing*, 61 Ill. 201, where it is said: "Counsel for appellees assumes that, if the writ was void—if the court had no jurisdiction—then there was no necessity to defend, or for a motion to dissolve the injunction. The bill was, in fact, pending, and the injunction had been issued. A party has an equal right to come into court to defend a void, as a valid, writ. * * * In this case the parties were liable to fine and imprisonment—they were under restraint until the court made an order to the contrary—and it was eminently proper that they should appear in court and make their defence."

In that case the cause was reversed, and the court below directed to hear the evidence upon the suggestion of damages.

In *Adams v. Olive*, 57 Ala. 249, this question is referred to as follows:

"It must not be inferred, however, that we mean to intimate that even if Judge Keils, who made the *fiat* that an injunction issue upon the execution of a proper bond, had no authority to make such an order, and the writ of injunction might therefore have been disregarded; yet defendants who caused the writ to be wrongfully issued, and obtained the benefit of a delay thereby in favor of their principal, would be allowed to take advantage of their own wrong, and be released from the obligation of their bond. They could not be discharged from liability in such a case on that account."

In *Hanna v. McKenzie*, 5 B. Mon. 314, it is said: "The question then arises whether the bond, executed preparatory to, and, as alleged, as a condition precedent to obtaining the injunction from the Hickman Circuit Court, is void from the fact that *that* court was not authorized to enjoin a judgment in the general court. Although it is conceded that the circuit court was not authorized to enjoin the judgment of the general court, yet it possessed general chancery

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who had accepted benefits under a statute of Virginia passed under and in aid of the ordinance of secession, could not repudiate his act, although both the ordinance and the statute were unconstitutional and void."

The appellees cite and rely upon the case of *Jenkins v. Parkhill*, 25 Ind. 473.

That was an action brought upon two injunction bonds executed in causes in which a common pleas judge issued restraining orders during the vacation of the circuit court. In passing upon the sufficiency of the evidence, this court says: "We think it was for the plaintiff to show that the restraining orders made by the common pleas judge, in vacation of the circuit court, related to some matter pending in the latter court. 2 G. & H., section 21, p. 25. The defendants were not estopped from showing a want of jurisdiction in the judge granting the orders over the subject-matter of the suits. If the orders were void, they were no restraint on the plaintiff, and the undertakings were of no validity against the makers."

We have set out in the above extract all that part of the opinion relating to this subject. No authority is cited, and the question seems to have received little consideration, the attention of the court being chiefly attracted to other questions, which are fully considered. The case does not seem to be in accordance with the weight of authority; but inasmuch as we do not regard it as strictly in point in this case, we refrain from an extended discussion of its soundness. In that case the defect in the jurisdiction of the court was want of jurisdiction of the subject-matter; while the answers in this cause rely upon a want of jurisdiction over the person of the defendant.

This distinction is referred to by Howk, J., in *Harbaugh v. Albertson*, 102 Ind. 69, where it was held that it was no defence to an action against a surety upon a replevin bond given in proceedings before a justice of the peace, that the justice was related to all the parties to the action. In the

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opinion it is said: "It may be conceded that such justice of the peace, by reason of his alleged relationship to the parties to such action of replevin, had not and could not acquire jurisdiction of the persons of such parties. But it by no means follows from this concession that such justice did not have full and complete jurisdiction of the subject-matter of such action of replevin, and might not, therefore, take and approve such replevin bond therein."

In the same opinion it is said, quoting from *Carver v. Carver*, 77 Ind. 498: "The principal obligor tendered the bond in suit to the justice as being such as the law required, and thus secured the writ which put him in possession of the personal property of another. The plainest principles of justice require that neither he nor his sureties should be permitted to defend against the bond upon the ground that a sufficient penalty was not provided. * * * There can be no doubt that the case is one to which the doctrine of estoppel fully and justly applies." See, also, *Cunningham v. Jacobs*, 120 Ind. 306.

Whatever may be thought of the soundness of those cases that hold that the obligors of a bond filed in proceedings where the court has no jurisdiction of the subject-matter of the action, are not estopped to deny the jurisdiction of the court when sued on the bond, there is no question but that they are estopped where the want of jurisdiction is of the person of the defendant. The authorities all agree upon that proposition.

We are of the opinion that both the third and fourth paragraphs of answer are insufficient to withstand a demurrer.

The appellees, by a cross-assignment of error, question the sufficiency of the complaint; the claim being made under this assignment that the complaint shows that the suit in which the bond was filed asked relief other than an injunction, and that, in such case, attorney's fees, and like expenses, are not recoverable.

We are of the opinion that the correct rule is to allow at-

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torney's fees, and like expenses, in so far as it relates to services rendered in resisting the making of the injunction, or in procuring its dissolution, although other matters may be involved in the litigation.

We are satisfied that the complaint states a cause of action for some amount, and the case not being before us in such condition as to make it proper to lay down the rule to be followed in fixing the damages to be recovered, we do not care to protract the discussion on this point.

The cause is therefore reversed, and remanded for further proceedings in accordance with this opinion.

Filed Oct. 28, 1891.

No. 14,751.

MABIN v. WEBSTER.

PLEADING.—Complaint.—Motion to Reject.—Where a complaint is sufficient to withstand a demurrer it is not error to overrule a motion to reject parts of the complaint.

SAME.—Motion to Strike Out.—When Properly Overruled.—A motion to strike out a paragraph of pleading admits the truth of all the facts well pleaded for the purpose of the motion, and it should not be sustained if the facts stated in the paragraph are relevant or pertinent to the question to which they are addressed, though not sufficient to withstand a demurrer.

MARRIAGE CONTRACT.—Action for Breach.—Answer.—Rescission of Contract.—Must be Specially Pleaded.—In an action to recover damages for an alleged breach of a marriage contract, the rescission of the contract is a proper defence to be pleaded to the action. It is error for the court to strike out a paragraph of answer alleging such a defence. The defence has to be specially pleaded, and is not admissible under the general denial.

SAME.—Incurable Disease of Defendant.—Mitigation of Damages.—In such an action it is competent for the defendant to prove in mitigation of damages that at the time of the breach he was afflicted with an incurable disease, and that marriage would have an injurious effect upon him, and probably shorten his life.

From the Dearborn Circuit Court.

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| 129 | 430 |
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W. S. Holman, W. S. Holman, Jr., J. K. Thompson and A. C. Downey, for appellant.

H. D. McMullen, W. R. Johnston, H. McMullen, G. M. Roberts and C. W. Stapp, for appellee.

OLDS, J.—This is an action to recover damages for an alleged breach of a marriage contract.

The first error assigned is that the court erred in overruling the appellant's motion to reject parts of the complaint, and the second error assigned is the overruling of the appellant's demurrer to the complaint.

We do not deem it necessary to set out the complaint or any portion of it, for it is clearly sufficient to withstand a demurrer, and the motion to reject parts was intended to take the place of and is to the same effect as a motion to strike out parts of the complaint, and there was no error in overruling the motion.

The next alleged error is in sustaining a motion to reject the third paragraph of appellant's answer.

This ruling of the court struck out the third paragraph of appellant's answer. Under our practice it is more commonly called a motion to strike out than to reject.

The third paragraph of answer was an attempt to plead a rescission of the marriage contract. The question as to whether or not it is properly pleaded so as to withstand a demurrer is not before us.

A motion to strike out admits the truth of all the facts well pleaded for the purpose of the motion, and the motion should not be sustained if the facts stated in the paragraph are relevant or pertinent to the question to which they are addressed, though not sufficient to withstand a demurrer. This is the doctrine as held by this court in the case of *Chicago, etc., R. W. Co. v. Summers*, 113 Ind. 10, and is well supported by authority. Such a motion will not perform the office of a demurrer. *Burk v. Taylor*, 103 Ind. 399. The rescission of the contract was a proper defence to

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be pleaded to the action, and such defence was not admissible under any other paragraph of answer.

It is contended by counsel for appellee that such defence was admissible under the general denial, which was pleaded.

A plea alleging a rescission of contract is an affirmative plea. It admits the making of the contract, and alleges a rescission of it. The court erred in striking out the third paragraph of answer.

The sustaining of a demurrer to the fourth paragraph of appellant's answer is assigned as error.

This paragraph attempts to plead that the appellant was afflicted with epilepsy, rendering it unsafe and improper for him to consummate the marriage contract with appellee. The paragraph is so indefinite and defective in its allegations of fact as to be clearly bad, even if the defence attempted to be pleaded would be good if properly pleaded. There was no error in sustaining the demurrer to this paragraph.

It was claimed on behalf of the appellant that he was afflicted with epilepsy, which was incurable, and that the assumption of marital relations would aggravate the disease and produce both physical and mental weakness and hasten his death.

On the trial of the cause the appellant offered to read, in his own behalf, the deposition of one T. C. Smith, a competent physician. The witness testified to the appellant having epilepsy, and having treated him for the same during 1883 and 1884.

The appellee objected to the reading of questions 8 and 9 and the answers thereto, which objection was sustained and proper exceptions reserved, and it is contended that such ruling is error. Questions 8 and 9, and the answers thereto, are as follows:

"Q. 8. I ask you, as a medical expert, the following question: What would be the probability of ultimate recovery of a man fifty years of age who has been afflicted

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with epilepsy for a period of five years or more, the epileptic fits being of a violent character, and occurring at irregular intervals of from three to fifteen times a year? A. There would be little, if any, probability of recovery. It is possible, but not at all probable.

"Q. 9. What effect would marriage probably have upon a man fifty years of age who has never been married, who is and has been subject to epileptic fits during a period of ten years, the attacks becoming more frequent from their incipency,—I mean upon the mental and physical health of the man? A. The probable effect would be an increased frequency of the attacks of epilepsy, with tendency to increase physical and mental weakness and hastening of death."

There is no contention but that the hypothetical case is applicable to the facts. The question presented is as to whether or not it is competent in such a case for the defendant to prove in mitigation of damages that at the time of the breach he is afflicted with an incurable disease, and that marriage would have an injurious effect upon him, and probably shorten his life.

In an action for breach of a marriage contract the plaintiff has the right to recover such damages as will compensate her for the non-fulfilment of the contract; she has the right to recover what would put her in as good a condition pecuniarily as she would have been in if the contract to marry had been fulfilled; she recovers for the disappointment of her reasonable expectations and worldly advantage of a marriage, which would give her a permanent home, an advantageous establishment. 2 Sedgwick Damages (8th ed.), section 638; *Lawrence v. Cooke*, 96 Am. Dec. 443.

Certainly, the anticipations and expectations of a happy future and a pleasant home in case of anticipated marriage would be greater, and the future would promise more, to one marrying a husband in full health and vigor, with a promise of long life and good health, and free from loathsome or

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hereditary diseases, liable to be transmitted to the children and fruits of the marriage, and the advantages to be gained by such a union would be prized higher than a union with one afflicted with an incurable and dreaded disease, having nothing to look forward to during the existence of the marital relations except to watch over and care for an unfortunate companion so sorely afflicted. The love for one who is afflicted may be mingled with pity and equally as strong and even bind them together more closely on account of such infirmities. In such case the uppermost wish would undoubtedly be for the restoration of her companion to health, and why so, if not for the betterment of both her husband's and her own condition? As health is preferable to sickness, so a marriage to one in good health must be preferable to a marriage with an invalid, afflicted with a dreaded disease, with no hope of recovery, and nothing to look forward to except continual suffering by the one and constant care on the part of the other.

In actions of this character even the financial condition of the defendant may be considered in estimating damages to be assessed and determining the advantage to have been gained by a consummation of the marriage.

It certainly is proper to show in mitigation of the damages that the defendant is afflicted with a dreaded incurable disease, which will not only cause the plaintiff constant care and anxiety, but shorten the term for which the marital relations may reasonably be expected to extend.

We are not without authority in support of the theory we have announced.

In 2 Sedgwick Damages (8th ed.), section 641, it is stated that "It may be shown in mitigation, that the defendant was affected with an incurable disease at the time of his breach of the promise," though it is further stated that this should depend upon prior knowledge of the fact by the plaintiff.

In this case it is not contended but that plaintiff had

Hawes, Administrator, v. Chaille et al.

knowledge of the defendant's affliction. In the case of *Sprague v. Craig*, 51 Ill. 288, the same doctrine is laid down. The court in that case says: "All must know that a marriage with a healthy person, free from all disease, would, when all things else were equal, be more desirable than with a person with an incurable and offensive disease." *Allen v. Baker*, 86 N. C. 91.

It follows from the conclusion we have reached that the court erred in sustaining an objection to this evidence.

There are numerous other errors alleged arising upon the trial of the cause, but as the judgment must be reversed on account of the errors in the rulings of the court in striking out the third paragraph of answer and excluding questions eight and nine, and the answers thereto in the deposition, we do not pass upon the other questions presented, as they will probably not arise on a re-trial of the cause.

Judgment reversed, with instructions to the circuit court to proceed in accordance with this opinion.

Filed Oct. 29, 1891.

No. 15,313.

HAWES, ADMINISTRATOR, v. CHAILLE ET AL.

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VENDOR AND PURCHASER.—Bona Fide Purchaser.—Notice.—Notice, either actual or constructive, before the payment of the purchase-money, prevents the acquisition of the character of a *bona fide* purchaser.

SAME.—Constructive Notice.—One who has notice of such facts as would put a reasonably prudent man upon inquiry is charged with the knowledge that an inquiry, reasonably prosecuted, would impart.

SAME.—Vendor's Lien.—Bona Fide Purchaser.—An administrator's deed contained nothing showing that the purchase-money was not fully paid. The proceedings prior to the order of sale showed merely that for part of the purchase-money notes were executed. The order of sale required the administrator to take freehold surties, and his report of the sale indicated that he did take such sureties, though he did not in fact do

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so. The defendants purchased the land from the grantees of the administrator after the purchase-money notes became due. The administrator brought an action to enforce a vendor's lien on the land in their hands.

Held, that the defendants were not chargeable with notice of such a lien, and that it could not be enforced.

From the Daviess Circuit Court.

J. C. Billheimer, J. Downey, A. J. Pagdett and A. Paget, for appellant.

W. R. Gardiner, S. H. Taylor and C. G. Gardiner, for appellees.

ELLIOTT, J.—Heffron and Hawes executed to the appellant two promissory notes in part payment of the purchase-money for land sold to them, under an order of court, by the appellant as administrator of the estate of Ormes Thomas, deceased. The appellees are purchasers of the land from Hawes and Heffron, and the question in the case is whether a vendor's lien can be enforced against the land in their hands.

If the appellees are *bona fide* purchasers in all that the term implies, the lien can not be enforced, for it is a fundamental principle of equity jurisprudence that a vendor's lien can not be enforced against land in the hands of a *bona fide* purchaser. Whether the appellees occupy the strong and favored position of *bona fide* purchasers depends upon whether they did or did not have actual or constructive notice before payment of the purchase-money. It is well settled that notice before payment of the purchase-money prevents the acquisition of the character of a *bona fide* purchaser. *Lewis v. Phillips*, 17 Ind. 108; *Dugan v. Vattier*, 3 Blackf. 245; *Rhodes v. Green*, 36 Ind. 7; *Anderson v. Hubble*, 93 Ind. 570, and authorities cited; *Blanchard v. Tyler*, 12 Mich. 339; *Keys v. Test*, 33 Ill. 316. It is also equally well settled that the notice may be actual or constructive. There is, in general, constructive notice where the facts are such as would put a reasonably prudent man upon inquiry,

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for the rule is that one who has notice of such facts is charged with the knowledge that an inquiry, reasonably prosecuted, would impart. *Kuhns v. Gates*, 92 Ind. 66; *Smith v. Sweigener*, ante, p. 363.

The evidence satisfactorily shows that the appellees did not have actual notice, or knowledge, of the lien asserted by the appellant, so that the sole question is whether they had constructive notice. If they had information of such facts as authorize the presumption to be made as one of law that the lien existed, then it must be adjudged that they did have constructive notice. 2 Pomeroy Eq. Juris., p. 41.

The counsel for appellant assume that the appellees are chargeable with notice, because the proceedings were of record. They affirm that the orders of the court informed all persons of the terms and conditions of the sale, and refer to the cases of *State, ex rel., v. Davis*, 96 Ind. 539; *Brush v. Ware*, 15 Pet. 93; *Coy v. Coy*, 15 Minn. 119; *Wiseman v. Hutchinson*, 20 Ind. 40; *Hazlett v. Sinclair*, 76 Ind. 488 (40 Am. Rep. 254); *Sample v. Cochran*, 84 Ind. 594. These cases do lay down, and rightly, the rule that a grantee is bound to examine the deeds under which he asserts title, and if that rule decides this case the appellant must succeed. But the controlling premise is tacitly taken for granted by counsel, whereas it is incumbent upon them to prove it, for without proof of that premise their entire argument falls. The unproved premise is, in substance, this: The purchaser from an administrator must know from his deed, or from the record, that the purchase-money remains unpaid. That premise can not be supplied in this case from the naked recitals of the deed. There is nothing in the deed itself showing, or tending to show, that the purchase money was not fully paid.

The administrator's deed, however, refers to the order of the court directing the sale, and we think that the purchasers were bound to take notice of the order. The general rule unquestionably is that a reference to other instruments makes it the duty of the party buying to take notice of such instru-

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ments. *Kerr v. Kitchen*, 17 Pa. St. 433; *Rutler v. Barr*, 4 Ohio, 466. But an examination of the proceedings which culminated in the order of sale, and in the confirmation of the administrator's deed, would have shown no more at most than that for part of the purchase-money promissory notes were executed; it would not, at all events, have shown that the notes were not paid at maturity. Had the purchase of the appellees been made before the notes became due there might, perhaps, be force in the argument that the records of the court supplied notice, at the time of the purchase, that the notes were unpaid; but the purchase was made after the notes became due. Viewed from the law side, the rule is that the presumption is that the notes were paid when due, and upon this presumption the purchasers had a right to act. Viewed from the equity side, two maxims are influential: One is, "Equity imputes an intention to fulfil an obligation;" the other is, "Equity regards that as done which ought to have been done." It seems clear, therefore, that, as there is nothing in the recitals of the deed, or record, showing an intention to hold an equitable lien, and that, as the purchase was made after the notes became due, the purchasers are not chargeable with notice of the existence of such a lien.

If, however, we are in error in the conclusion just stated, there is another reason why the appellant can not prevail. That reason is this: The order of sale required the administrator to take freehold sureties, and his report of the sale indicated that he did take such sureties. If he did what the order required, and his report indicated, no equitable lien could arise, since a vendor's lien can not exist where other security is taken. *Mattix v. Weand*, 19 Ind. 151; *Harris v. Harlan*, 14 Ind. 439; *Brown v. Gilman*, 4 Wheat. 291. The purchasers had a right to rely upon the report of the administrator; not only this, for they had also a right to presume that he obeyed the order of the court.

This case is not ruled by the decision in *Singer v. Schei-*

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ble, 109 Ind. 575. In that case the question was whether property purchased with trust funds had the trust so impressed and so disclosed by the record as to preclude a purchaser from successfully averring that he acquired title free from the burden of the trust; while here the question is whether the purchasers had notice of a vendor's lien. The cases are essentially different, for in this case there can be no doubt that the title passed to the purchasers unburdened by any trust, and that, in no event, could the appellant claim more than that the purchasers from the immediate grantees of the administrator took the land subject to the equitable vendor's lien.

Judgment affirmed.

Filed Oct. 27, 1891.

No. 15,208.

GALVIN, ADMINISTRATOR, ET AL. v. THE MERIDIAN NATIONAL BANK OF INDIANAPOLIS.

PROMISSORY NOTE.—*Action on.*—*Bona Fide Holder.*—*Fraud.*—*Burden of Proof.*—In order to cast the burden upon the holder of a note, payable in bank, to prove that it became the owner of the same in good faith before maturity, and for a valuable consideration, the evidence must show that the note was procured by fraud; it is not sufficient to show that it was procured without consideration.

ARGUMENT OF COUNSEL.—*Misconduct.*—Statements made by counsel outside the evidence, and admitted to be so at the time, but which are brought out by a statement of opposing counsel equally objectionable, will not cause the judgment to be reversed.

From the Hancock Circuit Court.

S. E. Urmston and *J. A. New*, for appellants.

A. Q. Jones, for appellee.

MILLER, J.—The appellee brought this action against

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George W. Galvin, as administrator of the estate of Albert Galvin, deceased, George W. Galvin, and the members of the firms of Landers, Barnes & Co., and Barnes, McMurtry & Co., on a promissory note for \$1,500, purporting to have been executed by Albert Galvin, and made payable to George W. Galvin, one year after date, at the First National Bank of Indianapolis, Indiana, which note was endorsed by the payee and by Landers, Barnes & Co. and Barnes, McMurtry & Co.

George W. Galvin, who was the payee of the note, by his answers and by a cross-complaint, claimed, among other things, to be the owner of the note, and denied having assigned or transferred it, except by way of deposit in the safe of Landers & Weaver, pending some business negotiations between them, and charged that the note was wrongfully taken from their safe and negotiated.

The other defendants answered by a general denial of the complaint.

A trial of the cause resulted in a verdict and judgment against all the defendants, from which George W. Galvin, individually, and as administrator, appeals. The other defendants have been notified, and refuse to join in the appeal.

The errors assigned in this court relate to the action of the court in overruling a motion for a new trial.

A large number of causes for a new trial were assigned in the motion, but only three of them are discussed in the briefs of counsel, viz. :

That the finding of the jury is not sustained by sufficient evidence.

Error of the court in refusing to permit the defendant George W. Galvin to show by the witness Weaver, on his cross-examination, that Galvin never received a cent, or anything in value, on account of the transfer of the note in suit.

Misconduct of the counsel for the plaintiff in making statements to the jury outside the evidence, and tending to prejudice them against the defendant George W. Galvin.

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It is insisted that under the evidence, as developed on the trial, it was incumbent on the plaintiff to show that it became the owner of the note before maturity, without notice, and for a valuable consideration. In support of this proposition *Giberson v. Jolley*, 120 Ind. 301, and *First Nat'l Bank, etc., v. Ruhl*, 122 Ind. 279, are cited and relied upon.

We are content with the propositions of law enunciated in these cases, but the appellants do not bring themselves within their purview.

The evidence introduced by the appellants tended to show that George W. Galvin had not received a consideration for the transfer of the note to the brokerage firm of Landers & Weaver, but there was no evidence whatever showing, or tending to show, that the note was obtained from the maker by fraud, or that it was obtained fraudulently by any of its subsequent holders.

In order to cast the burden upon the holder of a note payable in bank, to prove that it became the owner of the same in good faith, before maturity and for a valuable consideration, the evidence must show that the note was procured by fraud; it is not sufficient to show that it was procured without consideration. *Hinkley v. Fourth Nat'l Bank, etc.*, 77 Ind. 475; *First Nat'l Bank, etc., v. Ruhl*, *supra*.

The court, in one of its charges, told the jury that if the defendant, George W. Galvin, had proven by fair preponderance of the evidence, that the note in suit was endorsed by him to the firm of Landers & Weaver without any consideration, and was left by him with them as collateral security only in certain transactions had by him with such firm, the burden was on the plaintiff to show that the note came to her before maturity, and that she took the same in good faith and for a valuable consideration, and that without such proof she could not recover.

This was more favorable to the appellants than they were entitled to receive.

The court did not err in refusing to permit the appellant

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to ask the witness Weaver, on cross-examination, if George W. Galvin ever received a cent on account of the purchase of the corn and wheat about which he had testified. The witness had stated that the firm had been engaged in the purchase, for Galvin, of pork, corn and wheat, for future delivery, and that his losses on account of the shrinkage in values were in excess of the amount of this note.

There was no pretence in the testimony that Galvin had ever received anything on account of these purchases, and, therefore, the evidence proposed to be elicited did not contradict anything that the witness had sworn to in his examination in chief, and was not proper cross-examination. If the question had been answered it could not have been of benefit to the appellant.

The remaining cause for which a new trial was asked is the alleged error of the court in permitting one of the counsel for the plaintiff to say to the jury in his closing argument "That Mr. New had said while standing here, that this Mr. Galvin was an unsophisticated fellow; that he is not going to deal any more in bucket-shops, but that it had been whispered to him that he had taken the train to again deal in bucket-shops, but that it was not in evidence here."

This statement was confessedly without the evidence, but appears to have been brought out by a statement of opposing counsel equally objectionable. Under these circumstances, taking into consideration the character of the declaration, and the admission made at the time that it was not in evidence, we can neither commend the practice nor reverse the judgment on that account. *Shular v. State*, 105 Ind. 289.

Judgment affirmed.

Filed Oct. 27, 1891.

Downing *et al.* v. The Indiana State Board of Agriculture.

No. 16,152.

DOWNING ET AL. v. THE INDIANA STATE BOARD OF
AGRICULTURE.

STATE BOARD OF AGRICULTURE.—*Private Corporation.—Constitutional Law.—Impairing Obligation of Contract.*—The Indiana State Board of Agriculture, organized under an act of February 14th, 1851, entitled “An act for the encouragement of agriculture,” is a private corporation, and hence the act of March 4th, 1891, abolishing the said State board of agriculture, transferring all its assets, liabilities and credits to a State agriculture board, and providing for the creation of the State Agricultural and Industrial Board, is unconstitutional, as impairing the obligation of contract, and seeking to take the property of the State Board of Agriculture without due process of law.

From the Marion Superior Court.

A. G. Smith, Attorney General, and A. C. Harris, for appellants.

J. M. Butler, A. H. Snow and J. M. Butler, Jr., for appellee.

OLDS, J.—This action was brought by the appellee, the Indiana State Board of Agriculture, a corporation created under an act entitled “An act for the encouragement of agriculture,” approved February 14th, 1851, against the appellants, claiming to act as individuals and as a State agricultural and industrial board, created by an act of the Legislature of 1891, entitled “An act abolishing the State Board of Agriculture and transferring all its assets, liabilities and credits to a State agricultural board; providing for the creation of the State Agricultural and Industrial Board,” etc.,—which became a law by lapse of time without the Governor’s signature March 4th, 1891,—to quiet the title to certain real estate described in the complaint, and known as the State fair grounds, to declare null and void appellants’ claims of ownership, and enjoining them from setting up any interest in or ownership of said real estate, and to have said act of the Legislature of 1891 declared unconstitutional and void;

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also asking the same relief as to personal property, and asking that appellee be declared the owners of appropriations made by an act of the Legislature, approved February 23d, 1889, appropriating for the use of the appellee \$10,000 annually for five years, two of which annual appropriations have been paid to the appellee.

On the trial of the cause in the court below final judgment and decree was entered in favor of the appellee, quieting title of the appellee in the real estate, that the act of the Legislature of 1891 was unconstitutional and void, that appellee is the owner of the personal property, and that the appellee is the owner of the unpaid appropriation, and entitled to receive the payment of the same, and perpetually enjoining the appellants either as individuals or as a State board under the act of 1891 from claiming or asserting any title to or ownership of the real estate, personal property or said appropriation, or demanding or receiving possession of either or any part of the same.

We deem it unnecessary to set out or make any further statement of the pleadings or issues in the case, or the manner in which the question for decision is presented, as it is conceded that the sole question presented for the decision of this court is, whether or not the appellee, the Indiana State Board of Agriculture, is a private corporation? If it is a private corporation then the Legislature exceeded its powers by the passage of the act of 1891, and such act is unconstitutional and void, and the judgment must be affirmed. But if such board is a public corporation, a State institution, belonging to the State, and subject to legislative control, then said act of the Legislature is valid, and the judgment must be reversed.

The question must be determined by the construction to be placed on the act of the Legislature approved February, 14th, 1851, by which the Indiana State Board of Agriculture was incorporated.

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So much of the act as is material for the decision of this case reads as follows :

"An Act for the Encouragement of Agriculture, Approved February 14th, 1851.

"Section 4. That Joseph A. Wright of Marion county, Alexander C. Stevenson of Putnam county, Jeremiah McBride of Martin, Roland Willard of Kosciusko, Jacob R. Harris of Switzerland, Henry L. Ellsworth of Tippecanoe, John Ratliff of Morgan, Joseph Orr of Laporte, David P. Holloway of Wayne, John B. Kelly of Warrick, William McLain of Lawrence, Samuel Emerson of Knox, John McMahan of Washington, Thomas W. Sweney of Allen, George Brown of Shelby, and George Hussey of Vigo, be and they are hereby created a body corporate, *with perpetual succession*, in the manner hereafter described, under the name and style of the "Indiana State Board of Agriculture."

"Section 5. It shall be the duty of said board, or any five of them, to meet in the city of Indianapolis at such time as the Governor shall appoint, and to organize by appointing a president, secretary and treasurer, and such other officers as they may deem necessary ; also, determine by lot the time each member shall serve, so that the term of service of one-half of the members shall expire annually, on the day of the annual meeting in January ; and the president shall have power to call meetings of the board whenever he may deem it expedient.

"Section 6. There shall be held in the city of Indianapolis, on the first Thursday after the first Monday in January, an annual meeting of the Indiana State Board of Agriculture, together with the president of each county agricultural society, or other delegate therefrom duly authorized, who shall, for the time being, be *ex officio* members of the State Board of Agriculture, for the purpose of deliberation and consultation as to the wants, prospects and conditions of the agricultural interests throughout the State ; and at such annual meeting the several reports from the county societies shall

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be delivered to the president of the Indiana State Board of Agriculture ; and the said president and delegates shall at this meeting elect suitable persons to fill all vacancies in the Indiana State Board of Agriculture.

"Section 7. And it shall be the duty of said board to make an annual report to the General Assembly of the State, embracing the proceedings of the board for the first year, and an abstract of the proceedings of the several county agricultural societies, as well as a general view of the condition of agriculture throughout the State, accompanied by such recommendations as they may deem interesting and useful.

"Section 8. That the sum of one thousand dollars be and the same is hereby appropriated from the treasury for the use of the board, and an account of the expenditures of the board shall be included in the annual report of the board to the General Assembly.

"Section 9. That the Indiana State Board of Agriculture shall have the power to hold State fairs at such times and places as they may deem proper and expedient, and have the entire control of the same, fixing the amounts of the various premiums offered, embracing every article of science and art, or such portions of them as they may deem expedient and proper, calculated to advance the interest of the people of the State. *They may employ assistants, receive contributions, donations, etc.,* and unite with a county or district society for the purpose of defraying the expenses of said State fairs."

The foregoing act was passed under the Constitution of 1816, which contained the following provision :

"Section 1. Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government, * * * the General Assembly shall, from time to time, pass such laws as shall be calculated to encourage intellectual, scientific and *agricultural* improvement, by allowing rewards and immunities for the promotion and improvement of arts, sciences, commerce, manufactures, and natural history ; and to countenance and encourage the prin-

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ciples of humanity, industry and morality." Article 9, section 1.

The Constitution of 1816 contained no provision against creating private corporations by special acts.

In Angell and Ames on Corporations, at section 13, it is said: "The public benefit is deemed a sufficient consideration of a grant of corporate privileges; and hence, when a grant of such privileges is made (being in the nature of an executed contract), it can not, in case of a private corporation, which involves private rights, be revoked. The object in creating a corporation is, in fact, to gain the union, contribution, and assistance of several persons, for the successful promotion of some design of general utility; though the corporation may, at the same time, be established for the advantage of those who are members of it, the principle is, and has been so laid down by Domat, that the design of a corporation is to provide for some good that is useful to the public. 'With respect to acts of incorporation,' says one of the judges of the Court of Appeals of Virginia, 'they ought never to be passed but in consideration of services to be rendered to the public.'"

In section 14 the following statement is made: "The Bank of the United States, for example, if the stock belonged exclusively to the government, would be a public corporation, but inasmuch as there are other and private owners of the stock, it is a private corporation."

In section 31 it is said: "Private corporations are indisputably the creatures of public policy, and, in the popular meaning of the term, may be called public; but yet, if the whole interest does not belong to the government (as if the corporation is created for the administration of civil or municipal power), the corporation is private."

In section 32 it is said: "Nor does it make any difference that the State has an interest as one of the corporators, for it does not by such participation identify itself with the corporation. Says MARSHALL, C. J.: 'The Planters' Bank of

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Georgia is not the State of Georgia, although the State holds an interest in it.'"

In section 34 it is said: "A hospital founded by private benefaction is, in point of law, a private corporation, though dedicated by its charter to public charity. And a college founded, and endowed in the same manner, though for the general promotion of learning, is private. A college, merely because it receives a charter from the government, if founded by private benefactors, it has been held, is not thereby constituted a public corporation controllable by the government; nor does it make any difference that the funds have been generally derived from the bounty of the government itself." See sections 39 and 40.

In 1 Dillon on Corporations (4th ed.), section 22, it is said: "Corporations intended to assist in the conduct of local civil government are sometimes styled political, sometimes public, sometimes civil, and sometimes municipal, and certain kinds of them, with very restricted powers, *quasi* corporations—all these, by way of distinction, from private corporations."

Section 52. "A fundamental division of corporations heretofore adverted to, is into public and private. The importance of this distinction can not be too much emphasized, since upon it are based the legal principles which so broadly distinguish the two classes of corporations. With private corporations the present work has no other concern than to point out by way of illustration wherein they differ from those which are public. Both classes are alike created by the Legislature, and in the same way,—by special charter or under general incorporation acts."

In section 53 it is said: "Private corporations are created for private, as distinguished from purely public purposes, and they are not, in contemplation of law, public, because it may have been supposed by the Legislature that their establishment would promote, either directly or consequentially, the public interest. They can not be compelled to accept a charter or incorporating act. The assent of the

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corporation is necessary to make the incorporating statute operative ; but when assented to, the legislative grant is irrevocable, and it can not, without the consent of the corporation, be impaired or destroyed by any subsequent act of legislation, unless the right to do so was reserved at the time." Waterman on the Law of Corporation asserts the same doctrine. Sections 14, 16 and 17.

In the case of *Trustees of Dartmouth College v. Woodward*, 4 Wheaton, U. S., 518, it is held that public corporations are such only as are founded by the Government for public purposes, where the whole interests belong to the Government. In this case it is held that no authority exists in a government to regulate, control, or change a corporation created by it, except when the corporation is, in the strict sense, a public one, and its franchises the exclusive property of the government itself. In such a case the officers of the corporation would be public officers. The corporation in this case was created by a charter, in which the the trustees were mentioned by the name of "The Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, who are to govern the college, to fill up all vacancies which may be created in their own body, and it was held to be a private corporation.

In the case of *Board of Trustees, etc., v. State*, 14 Howard, 268, it was held that the acts of 1806 and 1807, establishing Vincennes University, and incorporating the same, by the name of the Board of Trustees of the Vincennes University, made it a private corporation over which the State could not exercise control. *Union Pacific R. R. Co. v. United States*, 99 N. J. 700.

The State University was established by an act which made provision for a board of trustees, and enacted that they and their successors shall be a body politic, with the style of "The Trustees of the Indiana University," in that name

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to sue and be sued, etc. In the case of *State, ex rel., v. Carr*, 111 Ind. 335, the court quoted from the case of *Regents, etc., v. Williams*, 9 Gill and J. 365, 388, with approval, the following language :

"A corporation may be private, and yet the act or charter of incorporation contain provisions of a purely public character, introduced solely for the public good. * * * A public corporation is one that is created for political purposes, with political powers, to be exercised for purposes connected with the public good in the administration of civil government; an instrument of the government subject to the control of the Legislature, and its members officers of the government, for the administration and discharge of public duties, as in the cases of cities, towns," etc. The court further says : " That the university was established under the direct authority of the State, through a special act of the Legislature, or that the charter contains provisions of a purely public character, nor yet that the institution was wisely established, and is and should be perpetually maintained at the public expense, for the public good, does not make it a public corporation, or constitute its endowment fund a public fund." It is further said : " The legal status of the State university being that of a technically private, or, at most, a *quasi* public corporation, the university fund, of which it is the sole beneficiary, is, therefore, not a public fund, within the meaning of the law."

These legal rules laid down by the authorities from which we have quoted, and stated the law as declared, are supported and adhered to by innumerable decisions of courts of the highest standing, from which we might quote and extend this opinion to an unreasonable and unwarranted length, but we deem it unnecessary to do so. Under the rules stated it is clear that the Indiana State Board of Agriculture is a private corporation, and it matters not to what extent the State has voluntarily aided it by contributions and appropriations.

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The corporation now owns a large amount of property. The main funds it has handled and used have been received from private citizens, railroad companies, the city of Indianapolis, and funds received from State fairs held by the board. The members of the board have not been chosen by the State; they are not State officers. It has not been a State institution. It is true there are no shares of stock issued and held by the trustees or private individuals. Neither are shares of stock issued by colleges and universities or charitable institutions, which are private corporations, and it is not necessary to make it a private corporation that shares of stock be issued. The act creating it made it a body corporate, with perpetual succession in the manner prescribed. It is in a sense an educational institution. It seeks to bring together people engaged in agricultural pursuits, as well as those engaged in manufacturing farm machinery and other articles adapted to use in the cultivation of the soil and harvesting of crops, and other articles used by the public, as well as those engaged in raising of stock, and to exhibit to those in attendance the crops resulting from the various methods of farming, and the various machinery manufactured for the use of those engaged in agricultural pursuits, as well as the various breeds of stock, and give to the people of the State, and particularly those engaged in agricultural pursuits, an opportunity of discussing the various methods of farming and farm implements used, and the different breeds of stock raised, and to educate the people in this way in the pursuits of agriculture, and to educate and improve the condition of the agriculturist, that they may gain a knowledge of the best methods of farming, best machinery to use, and the best breeds of stock.

An agricultural society is defined in the Century dictionary as "A society for promoting agricultural interests, such as the improvement of land, of implements of the breeds of cattle," etc.

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"A New English Dictionary" defines an agriculturist as "A student of the science of agriculture." Other definitions are given.

The trustees so elected have no financial interest in the property of the corporation, that is to say, they are not the owners of the property of the corporation in such a sense as that they can sell it and appropriate the proceeds to their own use any more than could the trustees of the State university sell and convert the proceeds of the property to their own use; they are simply trustees to manage and control it.

The institution, the corporation, exists for the benefit of the people of the State, and the law would not allow its purpose to fail by a failure of those charged with the duty of electing the successor, but neither the State, by its General Assembly, nor the trustees of the corporation, have any right to appropriate the property of the corporation to the use of State or the individual members of the board.

The General Assembly of the State has recognized the Indiana State Board of Agriculture as a private corporation. By an act of the Legislature in 1877 the State loaned to the corporation \$25,000, and took a mortgage upon its property. Again, in 1881, by an act of the Legislature such lien for \$25,000 was postponed, and made a subsequent lien to a lien of a third party on the lands of said corporation. See, in addition to the authorities above cited: 1 Morawetz Private Corporations (2d ed.), sections 1, 3 and 4; *Trustees, etc., v. Bradbury*, 11 Maine, 118; *Allen v. McKean*, 1 Sumner, 277; *State v. Trustees, etc.*, 5 Ind. 77; *Baltimore, etc., R. R. Co. v. Fifth Baptist Church*, 108 U. S. 317; *Yarmouth v. North Yarmouth*, 34 Maine, 411; *People v. Morris*, 13 Wend. N. Y. 325; *State Board of Agriculture v. Citizens Street R. W. Co.*, 47 Ind. 407.

The act of 1891 attempts to take from the appellee all the property acquired by it. It both impairs the contract or charter of 1851, by which it made the appellee a private

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corporation, and it seeks to take its property from it without due process of law.

Having reached the conclusion that the appellee is a private corporation, it leads to an affirmance of the judgment.

Judgment affirmed, with costs.

MCBRIDE, J., took no part in the decision in this case.

Filed June 19, 1891.

ON PETITION FOR A REHEARING.

OLDS, J.—Counsel for appellants earnestly insist that there should be a rehearing in this cause. Counsel state in their brief that “The court decides ‘it (the act of 1891) both impairs the contract or charter of 1851, * * * and it seeks to take its property from it (appellee) without due process of law.’ If either or both these propositions is not good law, then we must believe the court will grant our petition,” and then follow with an able discussion of these propositions, seeking to show that they are not good law.

As stated in the original opinion, the sole question presented in this case is whether or not the appellee, the Indiana State Board of Agriculture, is a private corporation. If it is a private corporation, then the act of 1891 both impairs the contract between the State and the appellee, as made by the charter of 1851, and it seeks to take its property without due process of law.

If the act of 1851 created and made the appellee a private corporation, then the property it holds as such corporation is as sacred as that of any individual, and any attempt by legislation to take such property from the corporation without compensation would be to impair the charter and take the property without due process of law. To sustain the decision it is only necessary to establish by sound reasoning and by authority that the appellee is a private corporation. That it is such a corporation we think is fully supported by the authorities cited in the original opinion.

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Counsel assert, in effect, that, as the members of the board have no financial interest in the property of the corporation, they hold it in trust for the people of the State, that it is the same as the State capitol, or any other property of the State, belonging to the whole people of the State, hence is State property, and subject to legislative control, as is any other property of the State. And it is further asserted that there can not be any corporation, either public or private, without natural members; that if all the members of a private corporation die, or all of the citizens of a government die or emigrate, the corporation is extinct, and that the members of this corporation are to be elected by certain local agricultural societies, and it is possible, and, indeed, probable that these local societies may go out of existence or refuse to elect, and then the query is made as to what will become of the property.

This latter proposition is, we think, foreign to the case. There is no more probability of these local societies going out of existence or refusing to elect, than that those whose duty it is to elect members of like boards, such as trustees of colleges or hospitals, will refuse to elect. The question propounded is not presented in this case, though we think the law would not allow its purpose to fail by reason of the failure or refusal of those whose duty it is to select the members to do so. "A court of equity never wants a trustee." The first proposition is answered by the authorities cited holding that certain colleges and universities are private corporations. The appellees hold the property of the corporation the same as do the trustees of private corporations, for educational purposes. The property of the Vincennes University and State University belongs to the people of the State to the same extent and in the same manner as does the property of the appellee corporation.

It is suggested that in case of a college, university or hospital, they are created for the benefit of only the few—the university for those seeking an education, and the hos-

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pital for those who are sick and afflicted and are permitted to enter for care and treatment—but with this theory of counsel we can not agree. The whole people of the State are interested in education, as they are in that the sick and afflicted shall be cared for. The whole people of the State are alike interested in the furtherance of education, whether it be of a literary character or in the development of agriculture; both pertain to the educational interests of the State.

The State, by its General Assembly, under the Constitution of 1816, might create a private corporation in furtherance of the education of her people in literature or agriculture, or it could establish an institution or create a board of trustees for that purpose, and operate the same as a State institution.

It is suggested by counsel that if this be a private corporation the State has, by the act of 1851, forever placed its agricultural and industrial interests, in so far as relates to exhibitions, beyond its control. We do not understand that it has done so. No exclusive right to hold exhibitions is attempted to be granted by the charter. It is suggested that the loaning of money by the State to the appellee, as stated in the original opinion, is not an argument in favor of the appellee being a private corporation, that even a *cestui que trust* may loan money, when necessary, to his trustee, and that an heir may loan money to an executor. Granting that they can, neither case is parallel with the case at bar. The heir and the executor and the *cestui que trust* and the trustees may be separate individual persons, capable of contracting with each other; but this case presents a case of the State loaning money to itself if the appellee is not a private corporation, and the taking of a mortgage on its own property. But, as it occurs to us, it is a case of legislative construction of the charter of 1851, treating it as having a corporate existence independent of the State, the loaning to it money and taking a mortgage upon its property. If it is not a

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private corporation the mortgage would be of no value; the State would be taking a mortgage upon its own property. Certainly the Legislature would not do so idle a thing. In our opinion the Legislature, by the loaning of the money and the taking of the mortgage, placed a construction on the charter, construing it as creating a private corporation, and dealing with it as such, loaning it money and taking a mortgage upon its property.

We are constrained to adhere to the decision in this case. The petition for rehearing is overruled.

Filed October 17, 1891.

No. 15,285.

THE BOARD OF COMMISSIONERS OF WABASH COUNTY v.
PEARSON.

NEGLIGENCE.—*Evidence of Subsequent Repairs.*—Evidence of repairs made after an injury has been sustained is incompetent to show antecedent negligence.

From the Wabash Circuit Court.

W. G. Sayre, C. E. Cowgill, H. B. Shiveley and H. C. Pettit, for appellant.

J. L. Farrar, for appellee.

MILLER, J.—The appellee brought this action against the appellant to recover for personal injuries occasioned by the fall of one span of a bridge.

The evidence shows that the accident happened on the 24th of January, 1884. One span of the bridge remained standing in the month of March, 1884, when it was examined by the board of commissioners of the county, and an order made for the building of an entirely new bridge.

On the trial of this cause the court, over the objection of

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the defendant, permitted the plaintiff to read in evidence the following record of the board referring to this bridge :

"And now the board take a recess to visit the bridge at Rich Valley, and on their return are of the opinion that the south span of said bridge now standing is unsafe and entirely too flimsy a structure on which to trust a heavy load, and they therefore conclude to build a new bridge entire, two spans of $137\frac{1}{2}$ feet each, and do now award the contract for the same to the Wrought Iron Bridge Company, of Canton, Ohio, for the sum of \$6,200 cash, and the old bridge delivered to said company as it is."

We are satisfied that the admission of this evidence was error, for which the judgment will have to be reversed.

In the case of *Terre Haute, etc., R. R. Co. v. Clem*, 123 Ind. 15, decided during the pendency of this appeal, it was held, after an extensive review of the authorities, that such evidence was not admissible.

The reasons given for the exclusion of such evidence are various. One is that subsequent acts ought not to be given in evidence to show antecedent negligence ; that it is that which occurs prior to the accident, and not that which has happened afterwards, that determines whether there has or not been a negligent discharge of duty. Another, and we think a better, reason is given in the following quotation from the opinion in *Terre Haute, etc., R. R. Co. v. Clem, supra* : " True policy and sound reason require that men should be encouraged to improve, or repair, and not be deterred from it by the fear that if they do so their acts will be construed into an admission that they had been wrong-doers."

In the recent cases of *Corcoran v. Village of Peekskill*, 108 N. Y. 151, *Menard v. Boston, etc., R. R. Co.*, 150 Mass. 386, and *Shinners v. Proprietors, etc.* (Mass.), 28 N. E. Rep. 10, this class of evidence has been held inadmissible.

The attempt is made by counsel for the appellee to distinguish between this evidence and that which the court held incompetent in the case of *Terre Haute, etc., R. R. Co. v.*

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Clem, supra, because of the express statement in the record that the span was "unsafe and entirely too flimsy a structure on which to trust a heavy load."

It is sufficient to say, without giving other reasons, that the admission spoken of refers not to the span that fell, but to the one that remained standing. We have, then, an offer to prove an admission that, three months after the accident happened, another span of the bridge was unsafe. This was an offer, not to prove the direct issue in the case, but a collateral fact, aside from that in dispute, and, therefore, not admissible. *Cleveland, etc., R. W. Co. v. Wynant*, 114 Ind. 525.

Taking into consideration the nature and class of the evidence erroneously admitted, we are unable to say that the judgment is so clearly right that we should affirm it notwithstanding the action of the court in admitting incompetent evidence.

Judgment reversed, with costs.

Filed Nov. 5, 1891.

No. 16,230.

DUCKWORTH v. MOSIER.

FORCIBLE ENTRY AND DETAINER.—*Appeal.*—*When Lies.*—*Justice of the Peace.*—*Title to Land.*—*Jurisdiction.*—*How Ousted.*—An action was instituted before a justice of the peace for the forcible entry and detainer of land. The judgment in the circuit court, to which the case was carried by appeal, was in favor of the plaintiff for fifteen dollars.

Held, that, in such action, the title to the land is not involved, and the appeal from the circuit court, if any right of appeal existed, was to the Appellate and not to the Supreme Court.

Held, also, where jurisdiction of the justice is asserted to be ousted because title is in issue, it must so appear from the record.

From the Morgan Circuit Court.

J. H. Jordan and *O. Matthews*, for appellant.

W. R. Harrison and *C. G. Renner*, for appellee.

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ELLIOTT, J.—The appellee brought this action before a justice of the peace, charging that he was in the peaceable possession of the land described, and that the appellant forcibly entered on the land, and by force retains possession thereof. The judgment in the circuit court, to which the case was carried by appeal, was in favor of the appellee for fifteen dollars.

As the case originated before a justice of the peace, the appeal from the circuit court lies to the Appellate Court, if any right of appeal at all exists, unless there is some peculiar controlling element in the case which distinguishes it from the cases over which justices of the peace have jurisdiction. There may be cases which originate before a justice of the peace that are appealable to this court, as for instance where the title to land is put in issue, as provided by the statute. Section 1434, R. S. 1881; *Deacon v. Powers*, 57 Ind. 489. Where the title is appropriately and rightfully put in issue, the case is not governed as to amount, or relief, by the ordinary rule of jurisdiction. *Bibbler v. Walker*, 69 Ind. 362. But, as fully decided by the case of *Judy v. Citizen*, 101 Ind. 18, an action for forcible entry and detainer is not one for the trial of the question of title to land. There is, therefore, no controlling element which brings the case within the jurisdiction of this court. Where title to land is rightfully made the controlling issue, that issue generally determines the jurisdiction. *Moyer v. Swygart*, 21 Ill. App. 497. While there may be cases originating before a justice of the peace in which the title to land may be put in issue, and thus give this court ultimate appellate jurisdiction, the present is not such a case. Where jurisdiction of the justice is asserted to be ousted because title is in issue, it must so appear from the record. *Deacon v. Powers*, *supra*; *Melloh v. Demott*, 79 Ind. 502.

We do not, of course, decide whether the Appellate Court has jurisdiction, nor do we decide whether the motion to dismiss the appeal can be entertained because notice has not

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been given under the rules of court, nor any similar questions; we simply decide that the jurisdiction, if there be any right of appeal, is in the Appellate Court.

The case is ordered to be transferred.

Filed Nov. 5, 1891.

No. 15,275.

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MARRIED WOMEN.—Deed.—Wife not Joining.—Foreclosure Sale.—Inchoate Interest of Wife.—When Becomes Perfect.—Quieting Titles—Practice.—A husband and wife joined in the execution of a mortgage on the husband's real estate. The husband afterward conveyed the mortgaged premises by deed, the wife not joining. After the latter conveyance was made the mortgage was foreclosed, the owner of the land and the wife being made parties defendant to the foreclosure proceeding.

Held, that it was proper for the court, upon the suggestion of the wife, without any cross-complaint being filed, to direct the sheriff to first offer the undivided two-thirds of the land for sale.

Held, also, that the sale of two-thirds of the land being sufficient to discharge the mortgage indebtedness, the inchoate interest of the wife in an undivided one-third became perfect upon the sale by the sheriff and the execution of a deed pursuant to such sale, and that she might have her title quieted.

From the Sullivan Circuit Court.

W. S. Maple, for appellant.

W. C. Hultz, O. B. Harris, G. W. Buff and J. S. Bays, for appellee.

COFFEY, C. J.—On the 9th day of June, 1883, William Canary was the owner in fee simple of the southwest fractional quarter of section eighteen, in township seven north, of range nine west, in Sullivan county, and on that day he and his wife, Edith Canary, who is the appellee here, executed a mortgage upon the same to the *Ætna Life Insurance Com-*

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pany to secure a loan of seventeen hundred dollars, made to the husband, William Canary. William Canary subsequently conveyed the land to one Fleming by deed, in which the appellee did not join. Fleming conveyed to appellant, Isaac H. Kalley. After the conveyance by William Canary the mortgage was foreclosed in the Sullivan Circuit Court, and the undivided two-thirds of the land was sold on a certified copy of the decree for a sum sufficient to pay the mortgage debt.

The owner of the land and the appellee were made parties defendant to the suit to foreclose the mortgage.

The appellee filed an answer, in which she averred that she was the wife of William Canary, and had not joined in the conveyance made by her husband, and prayed that an order might be made to first offer two-thirds of the land, but she did not file a cross-bill against the appellant or any one else.

The decree directed the sheriff to first offer the undivided two-thirds of the land for sale, and in the event it failed to sell for a sum sufficient to pay the mortgage debt, that he then offer the whole of the land for sale.

A deed having been executed by the sheriff to the purchaser, the appellee instituted this action to quiet her title to the undivided one-third of the above-described land.

It is contended by the appellant that the deed of conveyance executed by William Canary to Fleming vested in him the entire title to the land subject to the inchoate interest of the appellee, which inchoate interest could not become perfect except upon the death of the husband; while, on the other hand, it is contended by the appellee that her inchoate interest became perfect upon the sale of the land by the sheriff and the execution of a deed pursuant to such sale.

It will thus be seen that the controlling question in the case is as to whether the provisions of section 2508, R. S. 1881, are applicable to a sale made under the facts above stated.

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Section 2508, *supra*, provides that "In all cases of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage, where the inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale, such interest shall become absolute and vest in the wife in the same manner and to the same extent as such inchoate interest of a married woman now becomes absolute upon the death of the husband, whenever, by virtue of said sale, the legal title of the husband in and to such real property shall become absolute and vested in the purchaser thereof, his heirs or assigns."

It has long been the settled law in this State that where the wife joins the husband in the execution of a mortgage upon his land, to secure his debt, when her inchoate interest in the land becomes perfect, from any cause, she may compel the mortgagee to resort to the two-thirds of the land not owned by her before the sale of her one-third for the payment of the mortgage debt. *Medsker v. Parker*, 70 Ind. 509; *Haggerty v. Byrne*, 75 Ind. 499; *Leary v. Shaffer*, 79 Ind. 567; *Grave v. Bunch*, 83 Ind. 4; *Hardy v. Miller*, 89 Ind. 440; *Main v. Ginthert*, 92 Ind. 180; *Trentman v. Eldridge*, 98 Ind. 525; *Pouder v. Ritzinger*, 102 Ind. 571.

In the case of *Purviance v. Emley*, 126 Ind. 419, it was held that the wife may, where she has joined with her husband in the execution of a mortgage on his land to secure his debt, compel the mortgagee to first resort to two-thirds of the land to pay such debt, even before her inchoate interest becomes perfect. It was further held in that case that where her interest in the land was sold under the decree of foreclosure she was entitled to the purchase-price of one-third of the land, less the amount necessary to satisfy the mortgage debt.

The fact that the order in this case to offer two-thirds of the land in controversy, before resort to the other third, was made without a cross-complaint, we think was immaterial. It was a matter in which the appellant had no interest, as his

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rights were not affected by such order. His rights were the same whether the order was made or not, for if the whole land had been sold on the decree his interest would have been divested, and an order to sell the whole amounted to nothing if the interest of the appellee was not in fact sold.

We think the court might enter a direction to the sheriff to sell in the manner the land was sold in this case, on the mere suggestion of the wife, where her relation to the mortgage appears by the record, as in this case, without any adversary proceedings by her.

It is to be observed that the terms of section 2508, *supra*, are broad enough to cover the case now under consideration ; indeed, its terms are broad enough to cover the sale of land in which the wife has an inchoate interest, where such land is subject to judicial sale on a judgment against her husband's grantee, unless it be held that the phrase " Whenever, by virtue of said sale, the legal title of the husband in and to such real property shall become absolute and vested in the purchasers thereof," etc., relates to a title held by the husband at the time of the sale. But whether this statute is to receive a construction as broad as this we need not and do not now stop to inquire. We are clearly of the opinion that the phrase above quoted does not relate to a title held by the husband at the time of the sale, for such construction would place it in the power of the husband at any time, even after the rendition of judgment or the foreclosure of a mortgage, to postpone his wife's inchoate interest until his death, without her consent, by the execution of a conveyance. It is the purpose of this statute to secure the wife not only against the misfortunes of the husband, but his improvidence as well.

To hold that appellant may retain the one-third of the land in controversy in which the wife had an inchoate interest would be to hold that the husband's conveyance place his grantee in a better condition than that occupied by the husband, for, if the husband still owned the land, the appel-

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lee would take one-third of it as against him. The phrase above quoted refers, we think, to the title held by the husband at the time the lien attached upon which the real property is sold at judicial sale. That being true, upon execution of the deed by the sheriff, pursuant to the sale, the appellee became vested of one-third of the land in controversy to the same extent it would have become vested had her husband died. Such title is not a mere equity, but, under the express terms of section 2483, R. S. 1881, is a fee simple title.

Our conclusion is that, under the facts in this case, the appellee owns one-third of the land described in the complaint in fee simple, and that she was entitled to have her title thereto quieted.

Judgment affirmed.

Filed Nov. 4, 1891.

No. 15,261.

MARTIN v. MURPHY.

CONTRACT.—Breach of.—Measure of Damages.—Injunction.—Where the parties to a contract have agreed upon the damages which may be recovered for a breach thereof, the remedy is for the recovery of the sum thus fixed, and injunction will not lie. The sum fixed by the parties themselves in their contract will, in the absence of fraud, be deemed to be adequate, and the proper measure of damages by the court.

SAME.—Restraint of Trade.—Stipulated Penalty.—When Same Can be Recovered.—Where a physician, upon selling out his business, agreed "to practice medicine no more" after a certain date in the town where he had been following his profession, and the contract further provided that a stipulated penalty should be paid if the agreement was broken, the penalty is recoverable in an action based upon the breach of the agreement. For construction of the peculiar phraseology of the contract, see opinion.

From the Washington Circuit Court.

S. B. Voyles, J. H. Masterton and A. Elliott, for appellant.

J. A. Zaring and M. B. Hottel, for appellee.

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Martin v. Murphy.

MCBRIDE, J.—The only errors assigned in this case are on the action of the circuit court in sustaining demurrers to each paragraph of the complaint.

The complaint is in two paragraphs. By the first paragraph the appellant seeks to have the appellee enjoined from practicing medicine in the town of Salem, and by the second to recover liquidated damages for alleged breach of contract not to practice medicine at that place.

The contract is in writing, and is made a part of each paragraph of the complaint. It is as follows:

“SALEM, Washington county, Indiana.

“October 1, 1887.

“Articles of agreement entered into by Charles W. Murphy, of the first part, and Robert W. Martin, of the second part, as follows, viz: Whereas, Charles W. Murphy is now, and has been engaged in the practice of medicine in Salem, and vicinity, and connected with said practice said Murphy possesses office, consisting of certain office furniture, and necessary to carry on said practice, and together with a stock of medicines contained in said office. Said Charles W. Murphy hereby agrees, and acknowledges himself duly and firmly bound, in a bond of \$300, to be duly forfeited and paid to said Robert W. Martin within one year from date of this bond. Now the conditions of this bond are as follows: That the said Charles W. Murphy shall this day deliver to the said R. W. Martin all of said office furniture which shall consist of the following articles. * * * *
Said C. W. Murphy agrees to practice medicine no more in Salem after January 1, 1888, the practice and profits thereof to go to R. W. Martin, together with all of the drugs and medicines in said office; and C. W. Murphy further agrees to entering into a partnership under the firm name of Drs. Murphy and Martin; said partnership to continue till the first day of January, 1888, during which time the said C. W. M. agrees to use his best efforts to transfer his patronage in

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said practice to said R. W. Martin, and the profits of said partnership and practice shall be divided as follows: Two books shall be kept, and the accounts made by each partner shall be kept separate, and each partner shall at the close of said partnership be entitled to the different amounts charged in his book.

"C. W. MURPHY."

This was not signed by Martin, but immediately following it is a second part of the contract, signed by Martin alone, agreeing to pay the sum of \$175 absolutely, and \$100 conditionally, as the consideration for the preceding agreement of Murphy, and specifying the terms of payment.

The contract is unique, and its construction can hardly afford a precedent for the construction of other contracts, as it is highly improbable that another like it, in all respects, will ever be executed.

The rulings of the circuit court, sustaining separate demurrers to each paragraph of the complaint, present very different questions.

The appellee argues that the contract, being in restraint of trade, is not sufficiently specific as to time, and is unreasonable.

2d. That the agreement shows upon its face that the time during which the appellee agreed not to practice medicine in Salem had expired before he resumed practice.

3d. That the contract shows no consideration for the agreement not to practice; and,

4th. As to the first paragraph of complaint, seeking an injunction, the complainant had a specific remedy fixed by the contract, to which he is limited, and can not therefore have relief by injunction.

We think the position of the appellee with reference to the first paragraph is well taken.

Generally, one who shows the violation of a valid contract between him and another, binding the other not to pursue a given occupation, and shows that by such violation of con-

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tract he is injured, is entitled to an injunction restraining the offending party. This is upon the ground that from the nature of such a case, just and adequate damages can not be estimated for a breach of the covenant. *Baker v. Pottmeyer*, 75 Ind. 451 (460).

The parties to such a contract may, however, by its terms, agree upon stipulated damages which may be recovered for a breach of its conditions, instead of leaving that question open, uncertain and undetermined. When it appears that they have thus agreed upon the damages which may be recovered for a breach of the contract, the remedy is the recovery of the sum thus fixed. *Johnson v. Gwinn*, 100 Ind. 466; *Duffy v. Shockey*, 11 Ind. 70.

Where the party complaining has an adequate legal remedy, injunction will not lie. *Ploughe v. Boyer*, 38 Ind. 113; *Sims v. City of Frankfort*, 79 Ind. 446; *Hendricks v. Gilchrist*, 76 Ind. 369; *Ricketts v. Spraker*, 77 Ind. 371; *Caskey v. City of Greensburgh*, 78 Ind. 233.

The sum fixed by the parties themselves in their contract will, in the absence of fraud, be deemed to be adequate and the proper measure of damages by the courts. See *Dakin v. Williams*, 17 Wendell, 447.

The second paragraph of the complaint presents a very different question, and requires for its solution that we construe the contract and pass upon its validity.

The objection that it is not sufficiently specific as to time is not tenable. Murphy agrees "to practice medicine no more in Salem after January 1st, 1888." This is an agreement that he will never again practice medicine in Salem, and covers all time thereafter. This, appellee says, however, is unreasonable, and is a greater restraint than is necessary for the protection of the party, and is for that reason void.

A contract for the general restraint of any business is illegal, but it is otherwise if the restraint is reasonable and partial. Whether in a given case the restraint is reasonable

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is a question for the court. *Bowser v. Bliss*, 7 Blackf. 344; *Beard v. Dennis*, 6 Ind. 200.

A contract, reasonably limited as to the territory in which the specific business is not to be carried on, is not rendered invalid because the restriction as to time is indefinite or general. *Bowser v. Bliss*, *supra*; *Beard v. Dennis*, *supra*; *Alger v. Thatcher*, 19 Pick. 51; *Smalley v. Greene*, 52 Iowa, 241.

The appellee insists that, by reason of the peculiar phraseology of the contract, the time during which the appellee was to refrain from practicing medicine must be limited to one year from its date. Or that, at all events, after that time, no penalty could be recovered, and that, as the second paragraph shows that the appellee did not return and resume practice until more than a year and a half after the date of the contract, there can be no recovery.

It is the duty of the court in the construction of the contract to give effect, if possible, to all of its parts.

As we have heretofore said, it was in our opinion clearly the intention of the parties that the appellee should never again practice medicine in the town of Salem.

We think it equally clear that the parties intended to fix the measure of damages which might be recovered by the appellant for a violation of the contract. The agreement not to practice was evidently one of its material stipulations. Every other duty imposed by the contract upon the appellee was to be performed by January 1, 1888, and during the intervening three months he was to practice medicine as a *quasi* partner with the appellant. The position of the appellee, therefore, is that while the parties used language which is unequivocal, stipulating that the appellee would never again practice medicine at that place, and also clearly evinced their purpose to remove all doubt and uncertainty as to the measure of damages if the contract should be broken, they, after all, so limited the stipulation as to liquidated damages that it only actually covers nine months' time. The

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contract was evidently drawn by one unfamiliar with legal phraseology, and unaccustomed to the preparation of instruments of that character. We think that, construing together all the terms of the contract, in the light of the attendant circumstances, it was not the intention of the parties that there should be no penalty, and no recovery for a breach of the contract after the expiration of a year from its date, but that the undertaking should not mature, and there should be no recovery within that time. There are no negative words indicating that the parties intended there should be no recovery after that date; and while the question is by no means free from doubt, in our opinion, for a breach of the contract occurring at any time after the expiration of one year from its date, an action can be maintained for the recovery of the stipulated damages.

The claim that the contract shows no consideration for the promise not to again engage in practice can not be maintained. The second part of the contract contains the agreement of Martin for the payment of the consideration. The language used is general. He undertakes to pay certain sums of money, at certain times, and there is nothing to indicate that it is to be paid as a consideration for only a part of the appellee's undertakings. The only inference that can be drawn from the language used is that the money is to be paid as an entire consideration for each and all of the things purchased, including the promise not to practice. The second paragraph of the complaint avers that on a certain date, prior to the commencement of the suit, the appellee returned to Salem, and resumed there the practice of medicine, and was still engaged in such practice. We think it states a good cause of action, and that the court erred in sustaining the demurrer to it.

The judgment is reversed, with instructions to the circuit court to proceed in accordance with this opinion.

Filed Nov. 5, 1891.

Morningstar v. Musser *et al.*

No. 15,102.

MORNINGSTAR v. MUSSER ET AL.

BILL OF EXCEPTIONS.—Practice.—Evidence.—Where the stenographer's report is referred to in the bill of exceptions, but is not incorporated therein, it does not become part of the bill.

PRACTICE.—Alleged Admission of Incompetent Evidence.—Prejudicial Error Must be Shown.—Where the evidence is not in the record, the judgment will not be reversed on account of the admission of alleged incompetent evidence, unless it is affirmatively made to appear that its admission was error, and that the appellant was harmed thereby.

From the Owen Circuit Court.

D. E. Beem, W. Hickam, C. G. Renner and W. R. Harrison, for appellant.

G. A. Adams and J. S. Newby, for appellees.

ELLIOTT, J.—In the bill of exceptions incorporated in the record the report of the stenographer is referred to as containing the evidence, but the report is not made part of the bill, nor was there any attempt to make it a part of the bill except by a general reference. That evidence can not be brought into the record in the mode here pursued has been declared in many cases. *Wagoner v. Wilson*, 108 Ind. 210, and cases cited; *Fahlor v. State*, 108 Ind. 387; *Stone v. Brown*, 116 Ind. 78; *Flint v. Burnell*, 116 Ind. 481; *Butler v. Roberts*, 118 Ind. 481; *Colt v. McConnell*, 116 Ind. 249; *Doyal v. Landes*, 119 Ind. 479; *Patterson v. Churchman*, 122 Ind. 379; *Stevens v. Stevens*, 127 Ind. 560, and cases cited p. 563; *Dick v. Mullins*, 128 Ind. 365.

The settled rule is, and long has been, that only written evidence can be made part of the bill by reference. *Patterson v. Churchman*, *supra*; *Cluck v. State*, 40 Ind. 263; *Stratton v. Kennard*, 74 Ind. 302; *Stewart v. Rankin*, 39 Ind. 161. At common law the whole evidence, written as well as oral, was required to be embodied in the bill before it was signed. *Irwin v. Smith*, 72 Ind. 482, and cases cited

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| 129 | 470 |
| 130 | 191 |
| 129 | 470 |
| 181 | 481 |
| 181 | 570 |
| 129 | 470 |
| 139 | 191 |
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| 146 | 53 |

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pp. 448, 449; *Cincinnati, etc., R. R. Co. v. Clifford*, 113 Ind. 460, and cases cited p. 468. It is only by virtue of the statute that written evidence can be carried into the bill by reference, and the use of the words "here insert." *Patterson v. Churchman*, *supra*, and authorities cited p. 389. We can not, therefore, regard the evidence as in the record.

It is incumbent upon an appellant to bring to this court a proper record. *Fellenzer v. Van Valzah*, 95 Ind. 128; *McArdle v. McGinley* 86 Ind. 538; *Collins v. United States Ex. Co.*, 27 Ind. 11. It is further incumbent upon him to present such a record as affirmatively shows error, and that the error was probably prejudicial. This is true for the reason that he must overcome the presumption which prevails in favor of the ruling of the trial court that no harmful errors were committed. It has been held in a great number of cases that a judgment will not be reversed unless the record makes it appear that there was error prejudicial to the substantial rights of the appellant. *Wayne County Tp. Co. v. Berry*, 5 Ind. 286; *McDermitt v. Hubanks*, 25 Ind. 232; *Nixon v. Campbell*, 106 Ind. 47; *Louisville, etc., R. W. Co. v. Thompson*, 107 Ind. 442; *Harter v. Eltzroth*, 111 Ind. 159; *Cline v. Lindsey*, 110 Ind. 337; *Perkins v. Hayward*, 124 Ind. 445; *Shugart v. Miles*, 125 Ind. 445, and cases cited; *Rogers v. Leyden*, 127 Ind. 50 (55). There may, of course, be cases where the character of the ruling as exhibited by the record discloses its prejudicial influence, but the mere showing that an error was committed is not always sufficient. Where immaterial evidence is admitted the rule is that the error is harmless because such evidence could not have influenced the verdict, but where material evidence is admitted and there is a probability that it worked injury it will be sufficient to warrant a reversal. *King v. Enterprise Ins. Co.*, 45 Ind. 43; *Weik v. Pugh*, 92 Ind. 382; *Taylor v. Williams*, 120 Ind. 414. It is correctly held in *Medsker v. Pogue*, 1 Ind. App. 197, and in *Houk v. Allen*, 126 Ind. 568, that an erroneous ruling may, where the

The Mississinewa Mining Company v. Patton *et al.*

record fully and properly shows it to be material and influential, authorize the inference that it prejudiced the party against whom it was admitted, but it is probable that in the latter case some of the expressions are too strong. In the case before us the evidence asserted to be incompetent is not in the record, and hence there is no affirmative showing of error, much less is there any showing warranting the inference that the alleged wrongful rulings probably influenced the jurors in making their verdict.

Judgment affirmed.

Filed Nov. 3, 1891.

No. 13,293.

THE MISSISSINWEA MINING COMPANY v. PATTON ET AL.

PLEADING.—*Misjoinder of Parties.—Demurrer.*—In an action by a wife for damages for the destruction of her property caused by the negligence of the defendant, where the name of the husband appears in the caption of the complaint as plaintiff, but is not mentioned in the body of the complaint, and no attempt is made to state a joint cause of action, the name of the husband in the caption will be regarded as surplusage, and the complaint is not bad on demurrer for failure to present a good cause of action in favor of both plaintiffs.

SAME.—*Negligence.*—A complaint which charges negligence in general terms is good on demurrer.

NEGLIGENCE.—*Natural Gas Company.—Escape of Gas from Mains.—Duty to Public.*—A natural gas company which has its mains and pipes laid in the streets of a town owes a duty to the citizens and property-owners to use reasonable and ordinary care in so planting its pipes and mains as to prevent the escape of gas therefrom in such quantities as to become dangerous to life and property.

From the Grant Circuit Court.

C. E. Shipley, for appellant.

W. H. H. Carroll and *G. H. Dean*, for appellees.

MILLER, J.—The appellee Cora M. Patton brought this

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| 129 | 472 |
| 136 | 663 |
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| 137 | 285 |
| 129 | 479 |
| 146 | 600 |
| 129 | 472 |
| 150 | 654 |
| 129 | 472 |
| 162 | 118 |

The Mississinewa Mining Company v. Patton *et al.*

action against the appellant to recover damages alleged to have been caused by the negligence of the appellant.

In the caption of her complaint the name of her husband appears as a co-plaintiff, but in the body of the complaint no mention is made of him in any manner. The property alleged to have been destroyed is averred to be her property, and no attempt is made to state a joint cause of action. Under the circumstances we must regard the name of the husband in the caption as surplusage, and hold that the complaint is not bad on demurrer for failure to present a good cause of action in favor of both plaintiffs, under the rule laid down in *Berkshire v. Shultz*, 25 Ind. 523, and cases following it. See, also, *Stewart v. Babbs*, 120 Ind. 568.

The complaint is in a single paragraph, and charges that the plaintiff was the owner of a dwelling house and lot in the town of Marion; that the house was of the value of \$1,250, and that it contained personal property belonging to her of the value of \$750; that the defendant was a corporation, organized under the laws of Indiana, being engaged in furnishing natural gas for fuel and light to the citizens of Marion, having and owning mains and pipes laid in the streets of said town, so carelessly laid and constructed said pipes and gas mains as to allow and permit such gas to flow and escape from its line of pipe through which such natural gas was being conducted over, upon, through, and into plaintiff's lot aforesaid, and into the dwelling aforesaid, and to accumulate therein in such quantity that the same came in contact with a lighted lamp therein, without the fault of plaintiffs, and exploded, and set fire to and destroyed the building and its contents, without any fault of the plaintiff, to her damage in the sum of \$2,000.

A demurrer was overruled to this complaint, and the ruling is assigned as error.

The first objection to the complaint pointed out in the brief of counsel is that it does not show that the defendant

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owed the plaintiff any duty of which negligence of the defendant could be considered a breach.

The complaint is not very full or specific in its statement of the acts of negligence of which the defendant was guilty, or of the manner in which the plaintiff was injured, but it does show that the plaintiff owned a lot in the town, and that the defendant had its mains and pipes laid in the streets of the town. This we think is sufficient to show that the defendant owed a duty to the property-owners of the town to use reasonable and ordinary care in so planting its pipes and mains as to prevent the escape of gas therefrom in such quantities as to become dangerous to life and property. This duty the defendant owed to the community in virtue of its occupancy of the public streets which belonged to the community, for its own special and extraordinary use in conducting an article which we know to be "in a high degree inflammable and explosive." *Jamieson v. Indiana, etc., Co.*, 128 Ind. 555.

In *Sisk v. Orump*, 112 Ind. 504, it is said: "There can, as a general rule, be no action, although there is negligence, unless the party guilty of negligence was under some duty to the person who sustains the injury. While it is essential that the defendant should be under some duty to the plaintiff, it is not essential that the duty should be directly owing to him as an individual. A defendant who owes a duty to the community owes it, as a general rule, to every member of the community, and if any member suffers a special injury from a breach of that duty, an action will lie."

The liability of gas companies for damages occasioned by leakage from their pipes and mains has been frequently recognized by the courts. *Ormslaer v. Philadelphia Co.*, 31 Fed. Rep. 354; *Emerson v. Lowell, etc., Co.*, 3 Allen, 410.

It is also objected that the complaint does not show how the gas was conducted from the leak in the main to the

Saucer v. Keller *et al.*

house. As has been observed, the allegations of the complaint are not full and specific, and if a motion to make the pleading more specific, definite, and certain, had been filed and overruled, as was the case in *Cincinnati, etc., R. R. Co. v. Chester*, 57 Ind. 297, we would feel called upon to reverse the judgment; but it has many times been held that a complaint is good on demurrer which charges negligence in general terms. *Deller v. Hofferberth*, 127 Ind. 414; *Town of Rushville v. Adams*, 107 Ind. 475; *Cleveland, etc., R. W. Co. v. Wynant*, 100 Ind. 160; *Louisville, etc., R. R. Co. v. Krinning*, 87 Ind. 351; *Cincinnati, etc., R. R. Co. v. Chester*, *supra*.

We can not know that natural gas will not pass under the soil from a street main to a house in sufficient quantities to cause an explosion, and therefore can not take notice that the complaint charges an impossibility.

We are also of the opinion that the complaint sufficiently alleges that the injury to the property of the plaintiff occurred without her fault or negligence.

Holding, as we do, that the complaint was not subject to demurrer, and no other question being discussed by counsel in their brief, the judgment is affirmed, with costs.

Filed Nov. 3, 1891.

No. 15,173.

SAUCER v. KELLER ET AL.

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| 139 | 475 |
| 147 | 532 |

LICENSE—Executed.—Power of Revocation.—Where A., in pursuance of a parol license, entered upon the lands of B. and put in a tile ditch intersecting a ditch theretofore constructed upon B.'s land, and expended money and labor,

Held, that the license became an executed one, and that B. could not revoke it at will, and obstruct the ditch and take out the tiling.

From the Howard Circuit Court.

Saucer v. Keller et al.

R. Kimple, J. C. Blacklidge, W. E. Blacklidge and B. C. Moon, for appellant.

J. F. Elliott and S. L. Kirkpatrick, for appellees.

OLDS, J.—The appellant and the appellees were adjoining land-owners. The land of the appellees was wet, and unfit for cultivation without drainage, and the natural and only outlet for the drainage of appellees' land was across the land of the appellant.

The appellees being desirous of draining their lands entered into a parol agreement with the appellant whereby appellees were allowed to connect the ditches upon their own land with a ditch on the land of the appellant, by constructing and putting in tile drain across the land of the appellant and intersecting with the ditch upon his land, thereby affording drainage for the appellees' land, the appellees agreeing to pay the appellant a compensation for such privilege, the amount to be fixed after the drain was completed, by appellant and appellees each selecting a disinterested person to fix the amount to be paid. In pursuance of this agreement the appellees proceeded to and did put in said tile ditch, connecting the ditches upon their own land with that upon appellant's land, at their own expense, and when completed selected a person to act for them in fixing the amount of compensation to be paid. The appellant neglected and refused to select any person to act for him in pursuance of said agreement. After the lapse of nearly two years the appellant, without authority, wrongfully took up some of the tiling in the ditch so constructed by the appellees upon his land, and thereby obstructed the ditch and drainage of appellees' land.

The appellees file their complaint in this action, alleging, in substance, the foregoing facts, and that they have at all times been willing to pay the amount fixed by the persons to be chosen to assess the amount to be paid appellant, and that they are willing to pay a reasonable sum. They further

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allege that appellant is threatening to, and is about to, take up other portions of the ditch, and to change the line of the ditch on his land which their ditch intersects, thereby destroying their means of drainage, asking for damages and for a restraining order preventing the appellant from further interfering with such drainage.

Issue was joined by answer of general denial. The cause was tried by the court, resulting in a finding and judgment for the appellees.

Errors are assigned that the complaint does not state facts sufficient to constitute a cause of action, and in overruling a motion for a new trial.

The question is presented as to the validity of the license to enter upon the land of the appellant and construct the drain.

In the case of *Ferguson v. Spencer*, 127 Ind. 66, the law in regard to parol license is well stated as follows: "It is everywhere settled that a parol license to use the land of another is revocable at the pleasure of the licensor, unless the license has been given upon a valuable consideration, or money has been expended on the faith that it was to be perpetual or continuous. Where a license has been executed by an expenditure of money, or has been given upon a consideration paid, it is either irrevocable altogether, or can not be revoked without remuneration, the reason being that to permit a revocation without placing the other party *in statu quo*, would be fraudulent and unconscionable." It is further said: "Where a license is coupled with an interest, or the licensee has done acts in pursuance of the license which creates an equity in his favor, it can not be revoked." *Hall v. Hedrick*, 125 Ind. 326; *Messick v. Midland R. W. Co.*, 128 Ind. 81.

The facts in the case at bar show that the appellees' natural and only outlet for the drainage of their land was across the lands of the appellant. By proper legal proceedings they could have obtained drainage over and across the land of

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the appellant. Instead of resorting to the remedies afforded by the drainage laws, the parties enter into a mutual agreement whereby appellees were given a parol license to enter upon the lands of the appellant and put in a tile ditch, intersecting a ditch theretofore constructed on appellant's lands. The appellees, in pursuance of the parol license given to them, entered upon appellant's land and expended money and labor and put in the ditch, and it became an executed license; the appellees did all they could, the ditch was completed affording them a drainage for their lands. Upon the faith of the license they constructed the ditch and selected one of the arbitrators, and were ready and willing to pay any reasonable compensation for such use of the appellant's lands. They were guilty of no breach of the contract, and the appellant could not revoke the license at will and obstruct the ditch and take out the tiling. The complaint alleges a threatening to further interfere with the drainage. The complaint is sufficient.

It is next urged that the finding is not supported by sufficient evidence. We have examined the record. There is some evidence to support the finding.

There is no error in the record.

Judgment affirmed, with costs.

Filed Nov. 5, 1891.

No. 15,322.

KEDY ET AL. v. KRAMER ET AL.

MARRIED WOMAN.—*Liability of.—Note and Mortgage.*—A married woman who buys property may execute a note and may, jointly with her husband, execute a mortgage to secure the purchase-money, and it is not material whether she purchases for herself alone or for herself and husband. If she acquires a beneficial ownership in the land purchased she receives a consideration for her contract, and is a principal and not a surety.

Kedy et al. v. Kramer et al.

From the Clinton Circuit Court.

J. V. Kent, for appellants.

H. G. Morrison and *M. Morrison*, for appellees.

ELLIOTT, J.—The appellee sued upon a note and mortgage executed by William U. Kedy and Meda Kedy to Oliver Galvin, and by Galvin assigned to the appellee.

The answers of the appellants were in confession and avoidance, and hence admitted the material allegation of the complaint that the note and mortgage were assigned to the appellee. As this allegation was admitted, the appellants can not successfully insist that there is a failure of evidence, because none was offered to prove the assignment.

A married woman who buys property may execute a note and may, jointly with her husband, execute a mortgage to secure the purchase-money, and it is not material whether she purchases for herself alone or for herself and her husband. *Miller v. Shields*, 124 Ind. 166; *Berridge v. Banks*, 125 Ind. 561; *Young v. McFadden*, 125 Ind. 254. If she acquires a beneficial ownership in the land purchased she receives a consideration for her contract, and is a principal, not a surety. Such a contract as that of the purchase of land where there is one deed conveying to a wife and her husband jointly, can not be split into fragments to the prejudice of the vendor, but, as to him, all the purchasers are principals, and the promise to pay indivisible. Where the vendor conveys to the wife, naming her as sole grantee, it is even more clear that she can not be heard to aver that the consideration did not move to her.

We have not examined the questions of appellate practice discussed by appellees' counsel with care, but from such an examination as we have given them we are inclined to think the points well made.

Judgment affirmed.

Filed Nov. 6, 1891.

• Robinson v. Powers.

No. 15,361.

ROBINSON v. POWERS.

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| 129 | 480 |
| 154 | 149 |

PLEADING.—Complaint.—Sufficiency of After Verdict.—If a complaint is sufficient to bar another action for the same cause, it is good after verdict, where its sufficiency is questioned by a motion in arrest of judgment, or by an assignment of error in the Supreme Court, if the defects are such as may be supplied by proof.

SEDUCTION.—Instructions to Jury.—Definition of Seduction.—In an action for damages for seduction, it is not error for the court to instruct the jury that "the term seduction is defined in the law books in these words," etc., instead of stating an independent definition covered by the judge himself, the correctness of the definition not being questioned.

SAME.—Instructions to Jury.—Chastity of Plaintiff.—Presumption as to.—It is not necessary in an action for damages for seduction to instruct the jury that before the plaintiff can recover she must prove that at the time of the commission of the injury she was of chaste character, the court having instructed the jury that to entitle the plaintiff to recover she must have yielded to the illicit intercourse by reason of the promises and influence made and brought to bear upon her by the man. The presumption of law is in favor of the woman's chastity, and in the absence of any evidence to the contrary, the law will presume that she was chaste.

SAME.—Instructions to Jury.—Unchastity of Plaintiff.—In the absence of evidence tending to show that the plaintiff was an unchaste woman, or a woman of no virtue, it is proper for the court to refuse to instruct the jury that "An unchaste woman, or one who is not virtuous, can not be seduced."

From the Pike Circuit Court.

J. S. Pritchett, for appellant.

E. P. Richardson and *A. H. Taylor*, for appellee.

OLDS, J.—The appellee brings this action for damages for her own seduction. The case was commenced in the Knox Circuit Court, and the venue changed to the Pike Circuit Court, where there was a trial by jury, and a verdict and judgment in favor of the appellee for \$1,200.

Appellant filed a motion for a new trial, also made a motion in arrest of judgment, which motions were overruled and exceptions reserved.

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Errors are assigned on the rulings of the court in overruling the motion for a new trial, and overruling the motion in arrest of judgment. It is also assigned as error that the complaint does not state facts sufficient to constitute a cause of action. Counsel for appellant first discusses the sufficiency of the complaint.

It is contended that the complaint is insufficient for the reason that it fails to state with sufficient certainty the methods and means by which the seduction was accomplished.

No demurrer was filed to the complaint, it was first questioned after verdict. The rule is that if a complaint is sufficient to bar another action for the same cause, if the defects are such as may be supplied by proof, it is good after verdict, when its sufficiency is questioned by motion in arrest, or by an assignment of error in this court. *Burkhart v. Gladish*, 123 Ind. 337; *Colchen v. Ninde*, 120 Ind. 88; *Chapell v. Shuee*, 117 Ind. 481.

We deem it unnecessary to set out the complaint in this case, as we regard it as clearly sufficient. We think a fair construction to be put upon the complaint is, that it charges that the appellant accomplished the seduction of the appellee, and induced her to surrender her chastity and virtue to his embraces, by keeping company with her, expressing love for and promising to marry her; and this was the construction placed upon the allegations of the complaint by the judge who tried the cause in his instructions to the jury.

The appellant contends that the court erred in the giving of certain instructions, and in the refusal to give certain other instructions requested by the appellant. The evidence is not in the record.

It is insisted that the court erred in giving instruction numbered three, for the reason that it states that seduction is defined by the law books in certain words, and that it was the duty of the court to instruct the jury what seduction is

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under the law, and not what it is defined to be by the books. The instruction is short and we here set it out in full :

"3. The term 'seduction' is defined in the law books in these words: 'The use of some influence, promise, art, or other means on the part of a man by which he induces a woman to surrender her chastity and virtue to his embraces.' The particular influence charged in the complaint is that the defendant paid his attentions to the plaintiff, and expressed love and affection for her and promised to marry the plaintiff."

We think the jury were not misled by this instruction. "Seduction" is defined by Bouvier as "The act of a man in inducing a woman to commit unlawful sexual intercourse with him." The definition given is the same as declared by the Supreme Court of Oregon, in the case of *Patterson v. Hayden*, 17 Ore. 238, but no question is raised as to the correctness of the definition, and we think the fact that the court stated it was so defined by the books, instead of stating an independent definition coined by the judge himself or quoted from a book, is a mere technical objection, and not such error as justifies the reversal of the judgment.

The appellant next complains of the fourth instruction given to the jury. This instruction reads as follows :

"4. If the jury find from a preponderance of the evidence that the defendant Robinson was an unmarried man, and the plaintiff an unmarried woman at the time of the commission of the alleged injury, and that Robinson, by his attentions, expressions of love and affection for her, and promise to marry the plaintiff, thereby gained her affection and confidence, and importuned her to sexual intercourse with him, and she, through her confidence in him and love for him, yielded to his solicitations, it was seduction, for which, under the section of the statute before quoted, she may maintain an action and recover such damages as may be assessed in her favor; and, if the preponderance of the proof establishes the material propositions above named, you should find for

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the plaintiff, and assess her such damages as you think just and right under the circumstances."

The objection to this instruction is that it omits the element of previous chaste character; that, in order to constitute seduction, the woman must surrender her chastity, and that to be seduced a woman must be virtuous and chaste; in other words, that this instruction should have contained a statement to the effect that if the plaintiff at the time of the commission of the injury was an unmarried woman, of chaste character, and in yielding to his solicitations surrendered her chastity, it would have been a correct statement of the law, and without such an element in the instruction it is erroneous.

The presumption of the law is in favor of the woman's chastity, and in the absence of any evidence to the contrary the law will presume that she was chaste.

In the case of *State v. McClintic*, 73 Iowa, 663, the court holds that this presumption prevails in a criminal prosecution for seduction, and the State need not prove it.

In a case for seduction the general character for chastity of the person alleged to have been seduced is in issue. *Shattuck v. Myers*, 13 Ind. 46. The unchastity of the woman may be proven for two purposes; one as tending to show that she was not seduced—that she did not yield by reason of any influences, promises, arts or means brought to bear upon her by the man, but yielded on account of her own lust and want of chastity. It is also proper in mitigation of damages.

A woman of previous unchaste character may reform and afterwards be seduced, and recover such damages as she may have sustained, if she in fact reformed and was afterwards seduced.

The court charged the jury by this instruction that the plaintiff, before she could recover, and to establish seduction, must establish, by a preponderance of the evidence, that by reason of the defendant's attentions, expressions of love and

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affection for her, and of his promise to marry her, he gained her affection and confidence, and importuned her to sexual intercourse with him, and that she, through her confidence in him, and love for him, so gained by the means aforesaid, yielded to his solicitations. This placed upon the plaintiff the burden of proving that it was by reason of these promises and means used by defendant that she yielded, and not on account of her own lust and want of chastity.

The evidence not being in the record, it does not appear that the appellee's chastity was questioned by the appellant upon the trial, or that there was any evidence tending to establish want of virtue on her part previous to the injury complained of.

The presumption being in favor of the woman's chastity, she not having to introduce any evidence to support it unless attacked, it is not necessary to embody, in an instruction, such as the one under consideration, stating that the woman must have yielded to the illicit intercourse by reason of certain promises and influences made and brought to bear upon her by the man, a statement that it must also be proven that she was of previous chaste character.

This instruction declares that the jury must find from a preponderance of the evidence that certain facts are true before they can find for the plaintiff; and it was not necessary that any evidence should have been introduced on the subject of chastity, and, for aught that appears in this case, none was introduced.

The jury made their finding from the evidence. In the absence of proof, virtue was a presumption of law.

In the case of *Smith v. Milburn*, 17 Iowa, 30, the court held that an unmarried woman of previously unchaste character, might, in an action for her own seduction, recover damages for loss of health and all other injuries consequent upon the act of seduction, except injury to or loss of character.

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There are decisions holding that the character of the plaintiff before the seduction may be shown in mitigation of damages, but not as a complete defence. See *Weaver v. Bachert*, 44 Am. Dec. 159, and note, pp. 171 and 176.

We do not think the court erred in giving the fourth instruction.

The same objection is made to instruction numbered five.

It is next contended that the court erred in refusing instruction numbered two, requested by appellant. This instruction seeks to put into the element of seduction the fact that the woman must be at the time chaste. It concludes as follows: "An unchaste woman, or one who is not virtuous, can not be seduced."

In the absence of evidence tending to show the appellee to be an unchaste woman, or a woman of no virtue, this instruction was properly refused, even if such an instruction was proper under any state of the proof. It does not follow that because a woman has at some time surrendered her chastity to the embraces of one man, she may not be afterwards seduced by another; nor because she has once sinned that she can not repent, and then be seduced and recover for her seduction.

What we have said disposes of the question arising on the refusal to give the fourth instruction requested by the appellant.

There is no error in the record.

Judgment affirmed, with costs.

Filed Nov. 7, 1891.

Lamb *et al.* v. Cain *et al.*

No. 16,065.

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CHURCHES.—Deed of Trust.—Propagation of Certain Doctrines.—Diversion of Trust.—Where property has been dedicated by way of trust to support and propagate any definite doctrines or principles, and is being diverted from the use intended by the donor, by teaching a doctrine different from that contemplated at the time the donation was made, it is the duty of the court to make such orders in the premises as will secure a faithful execution of the trust confided. But, to induce a court of equity to interfere, the case must present a plain and palpable abuse of trust.

SAME.—Ecclesiastical Decisions.—How Regarded by Civil Tribunals.—Where a civil right depends upon some matter pertaining to ecclesiastical affairs, the civil tribunal tries the right and nothing more, taking the ecclesiastical decisions out of which the civil right arises as it finds them, and accepts such decisions as matter adjudicated by another legally constituted jurisdiction.

SAME.—Manner of Determining Right of Property of Organization.—Amendment of Church Constitution.—Powers of General Conference.—Property was deeded to persons named in the deed as trustees, and to their successors in office, in trust, for the Church of the United Brethren in Christ, to have and to hold "as long as said society may continue to use the meeting-house as a house of religious worship, for the use of the members of the society of such church in the United States according to the rules and discipline which from time to time may be agreed upon and adopted by the church at their general conference, and in further trust and confidence that they shall at all times forever thereafter permit such ministers and preachers belonging to such church as shall from time to time be duly authorized by the said general conference to preach and expound God's holy word therein."

Held, that, under the constitution of said church, the general conference has power to determine what is the constitution under which it acts, and to determine what is the confession of faith of the church which it represents.

Held, also, that the amended constitution, etc., of said church was properly adopted by its membership, two-thirds of the members voting on the question voting in favor thereof.

Held, also, that when the general conference resolved that a revised confession of faith and amended constitution had become the fundamental belief and organic law of said church (two-thirds of the members of the church voting, having voted in favor thereof), and that it would be in force after a certain date, the same was in force after that date.

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Held, also, that those who adhered to the amended constitution and revised confession of faith constitute said church, while those who refuse to do so, must be regarded as seceders, the revised confession of faith not being unscriptural or antagonistic to the doctrines, etc., of the church which existed at the time of the execution of the deed to the land in controversy.

SAME.—Amendment of Constitution.—Proportion of Votes Necessary.—Where a two-thirds vote was required to amend the constitution of said church, it is not necessary that two-thirds of the entire membership of the church should vote in favor of so amending, but simply that two-thirds of those actually voting, should vote in favor thereof.

From the Wayne Circuit Court.

T. J. Study, W. Lawrence and G. R. Young, for appellants.
J. F. Kibbey, — *Gunckel* and — *Rowe*, for appellees.

COFFEY, C. J.—This was an action by the appellees, in the Wayne Circuit Court, against the appellants, to recover the possession of the real estate described in the complaint, to quiet title thereto, and to enjoin the appellants from exercising any control over the meeting-house situated thereon. Upon issues formed, the cause was, by agreement, submitted to the court for trial, with a proper request for a special finding of the facts proven, with the court's conclusions of law thereon.

As the nature of the controversy between the parties fully appears by the special finding of the facts filed by the court, we need not refer to the pleadings in the cause. It appears from the special findings, among other things, that, at the time this action was brought, the Church of the United Brethren in Christ was an organized religious society in the United States, having official bodies for the government of the church, its members, congregations, and officers; each being clothed with certain powers, as follows:

First. The official board of each congregation, which meets monthly, and transacts the business of the congregations. It consists of the recognized preachers, exhorters, leaders, stewards, trustees, and Sunday-school superintend-

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ents who reside within the bounds of the congregation, or hold membership therein.

Second. The quarterly conference, composed of the presiding elder of the district, and the preacher in charge, and recognized preachers, exhorters, class-leaders and stewards, trustees and Sunday-school superintendents who reside within the district, or hold membership therein. It meets quarterly, and, among other things, appoints trustees of the meeting-houses, who hold during the pleasure of the quarterly conference.

Third. The annual conference, which meets yearly, is composed of the elders and licentiate preachers who have been received by the annual conference in each district, and is presided over by a bishop of the church.

Fourth. The general conference, which meets every four years, composed of elders, elected by the church members in every conference district throughout the society.

The official board is subordinate to the quarterly conference, the quarterly conference to the annual conference, and the annual to the general conference, the last being the highest legislative and judicial body of the church.

Some time prior to the year 1800 the Church of the United Brethren in Christ was organized as a religious society. No general conference of the church was held until 1815, when, on the 6th day of June of that year, the first general conference was held at Mt. Pleasant, in Pennsylvania, in pursuance of a call, which had before that time been made. This conference formulated a discipline, which contained the rules and doctrine, or confession of faith, of the church. Some changes in the phraseology of the last clause of this confession of faith were made by the general conferences of the church of 1819, 1825, 1833, 1837, 1841 and 1857, and in 1885 the confession of faith was as follows:

"OLD CONFESSION OF FAITH.

"In the name of God, we declare and confess before all

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men that we believe in the only true God, the Father, the Son, and the Holy Ghost ; that these three are one—the Father in the Son, the Son in the Father, and the Holy Ghost equal in essence or being with both ; that this triune God created the heavens and the earth, and all that in them is, visible as well as invisible, and, furthermore, sustains, governs, protects and supports the same.

“ We believe in Jesus Christ ; that He is very God and man ; that He became incarnate by the power of the Holy Ghost in the Virgin Mary, and was born of her ; that He is the Savior and Mediator of the whole human race, if they with full faith in Him accept the grace proffered in Jesus ; that this Jesus suffered and died on the cross for us, was buried, arose again on the third day, ascended into heaven, and sitteth on the right hand of God, to intercede for us ; and that He shall come again at the last day to judge the quick and the dead.

“ We believe in the Holy Ghost ; that He is equal in being with the Father and Son, and that He comforts the faithful, and guides them into all truth.

“ We believe in a Holy Christian Church, the communion of saints, the resurrection of the body, and life everlasting.

“ We believe that the Holy Bible, Old and New Testaments, is the word of God ; that it contains the only true way to our salvation ; that every true Christian is bound to acknowledge and receive it with the influence of the Spirit of God, as the only rule and guide ; and that without faith in Jesus Christ, true repentance, forgiveness of sins, and following after Christ, no one can be a true Christian.

“ We also believe that what is contained in the Holy Scriptures, to wit, the fall in Adam and redemption through Jesus Christ, shall be preached throughout the world.

“ We believe that the ordinances, viz., baptism and the remembrance of the sufferings and death of our Lord Jesus Christ, are to be in use and practiced by all Christian societies ; and that it is incumbent on all the children of God

particularly to practice them, but the manner in which ought always to be left to the judgment and understanding of every individual. Also the example of washing feet is left to the judgment of every one, to practice or not; but it is not becoming of any of our preachers or members to traduce any of their brethren whose judgment and understanding in these respects is different from their own, either in public or private. Whosoever shall make himself guilty in this respect, shall be considered a traducer of his brethren, and shall be answerable for the same."

This confession of faith was never submitted for ratification or adoption to a vote of the members of the church, but became the confession of faith and doctrine of the church by reason of its adoption by the delegates to this general conference, and as such it remained until the meeting of the general conference held in May, 1889.

A general conference met in Pickaway county, Ohio, on the 10th day of May, 1841. This conference did not ratify the constitution adopted by the preceding general conference, but adopted another constitution. A motion was made in the conference that a constitution for the better government of the church be adopted. On the following day the motion for a constitution was called up, a spirited discussion ensued, the vote was taken, and carried in favor of a constitution—yeas 15, nays 7. On motion, a committee of nine—one from each conference district—was appointed to draft a constitution. This committee reported a constitution, which was read twice, and laid upon the table until the following morning, when it was read a third time by sections, and adopted. This constitution was as follows:

" CONSTITUTION OF 1841.

" We, the members of the Church of the United Brethren in Christ, in the name of God, do, for the perfecting of the saints, for the work of the ministry, for the edifying of the body of Christ, as well as to produce and secure a uni-

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form mode of action, in faith and practice, also to define the powers and the business of quarterly, annual, and general conferences, as recognized by this church, ordain the following articles of constitution :

"ARTICLE I.

"Section 1. All ecclesiastical power herein granted, to make or repeal any rule of discipline, is vested in a general conference, which shall consist of elders, elected by the members in every conference district throughout the society; provided, however, such elders shall have stood in that capacity three years, in the conference district to which they belong.

"Sec. 2. General conference is to be held every four years; the bishops to be considered members and presiding officers.

"Sec. 3. Each annual conference shall place before the society the names of all the elders eligible to membership in the general conference.

"ARTICLE II.

"Section 1. The general conference shall define the boundaries of the annual conferences.

"Sec. 2. The general conference shall, at every session, elect bishops from among the elders throughout the church, who have stood six years in that capacity.

"Sec. 3. The business of each annual conference shall be done strictly according to discipline; and any annual conference acting contrary thereunto, shall, by impeachment, be tried by the general conference.

"Sec. 4. No rule or ordinance shall at any time be passed to change or do away the confession of faith as it now stands, nor to destroy the itinerant plan.

"Sec. 5. There shall no rule be adopted that will infringe upon the rights of any as it relates to the mode of baptism, the sacrament of the Lord's supper, or the washing of feet.

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"Sec. 6. There shall be no rule made that will deprive local preachers of their votes in the annual conferences to which they severally belong.

"Sec. 7. There shall be no connection with secret combinations, nor shall involuntary servitude be tolerated in any way.

"Sec. 8. The right of appeal shall be inviolate.

"ARTICLE III.

"The right, title, interest, and claim of all property, whether consisting in lots of ground, meeting-houses, legacies, bequests, or donations of any kind, obtained by purchase or otherwise, by any person or persons, for the use, benefit, and behoof of the Church of the United Brethren in Christ, is hereby fully recognized and held to be the property of the church aforesaid.

"ARTICLE IV.

"There shall be no alteration of the foregoing constitution, unless by request of two-thirds of the whole society."

This constitution, together with the confession of faith, which had before that time been adopted, was printed as the constitution and confession of faith of the church in the discipline of that year, and in each succeeding discipline every four years up to the year 1889. This constitution was never submitted to the members of the church for their approval or disapproval, but went into force immediately by virtue of its adoption by said general conference, and thus became the organic law of the church, and so remained until May 13th, 1889.

General conferences of the church were held every four years from 1841 up to, and including, the year 1889, when the last one prior to this suit was held.

On the 8th day of January, 1849, one John Brown was the owner in fee simple of the land in controversy in this suit, and on that day he executed a deed of conveyance for said real estate, donating, giving, and granting to Andrew

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Nicholson, Elias Lamb, Nathan Wilson, and Jesse W. Brooks, trustees, and to their successors in office, in trust for the church of the United Brethren in Christ, to have and to hold, the west half of said real estate forever, without any exception whatever, and the east half thereof, "as long as said society, or the citizens of the neighborhood, may continue to use the meeting-house as a house of religious worship for the use of the members of the society of the United Brethren Church in the United States, according to the rules and discipline which from time to time may be agreed upon and adopted by the church at their general conferences in the United States, and in further trust and confidence that they should at all times, forever thereafter, permit such ministers and preachers belonging to the said church, as should from time to time be duly authorized by the said general conferences to preach and expound God's Holy Word therein.
* * *

At the date of this deed there was, and ever since has been, a meeting-house on said land, used for the purpose of religious worship by a congregation of members of the Church of the United Brethren in Christ. It is known as "Sugar Grove Church," and is under the jurisdiction and control of the General Conference of the Church of the United Brethren in Christ. The legal title to said real estate has been held and owned by the trustees mentioned in said deed, and their successors in office duly elected and appointed, from the date of said deed to the date of the bringing of this suit.

A regular general conference of the church was held at Fostoria, Ohio, in May, 1885, composed of delegates duly and regularly chosen under the rules and regulations of the church provided therefor. At this conference, on the second day, a committee on revision, consisting of thirteen members, known and designated as "Committee No. Six," was appointed, to whom were referred the confession of faith, constitution, and section 3 of Chapter X. of the discipline.

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At a later day in the conference this committee made a report, in which it was resolved that a church commission, composed of twenty-seven persons, be authorized and established, consisting of the bishops of the church and ministers and laymen, appointed and elected by that general conference, an equal number from each bishop's district—except that the Pacific district should have two members besides its bishop; that the duties and powers of this commission should be to consider the present confession of faith and constitution of the church, and prepare such a form of belief, and such amended fundamental rules for the government of the church, as will, in their judgment, be best adapted to secure its growth and efficiency in the work of evangelizing the world: *Provided*, First. That the commission shall preserve unchanged in substance the present confession of faith so far as it is clear. Second. That it shall also retain the present itinerant plan. Third. That it shall keep sacred the general usages and distinctive principles of the church on all great moral reforms as sustained by the Word of God in so far as the province of their work may touch them. The report further provided that a majority vote of the commission should be necessary for the adoption of a confession of faith and constitution for submission to the members of the church; that the commission should meet at such time and place as the board of bishops might appoint, and was expected to complete its work by January 1st, 1886; that the commission should adopt, and cause to be executed, a plan by which the proposed confession of faith and constitution might receive the largest possible attention, and expression of approval or disapproval by the people of the church, including all necessary regulations for taking, counting and reporting the vote; and that, when the result of the vote of the church showed that two-thirds of all the votes cast had been given in approval of the proposed confession of faith and constitution, it should be the duty of the bishops to publish and proclaim said result through the official organs

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of the church ; whereupon the confession of faith and constitution, thus ratified and adopted, should become the fundamental belief and organic law of the church, and providing further that the adoption of the constitution aforesaid should in no way affect any legislation of that general conference for the coming quadrennium.

This report was signed by eleven of the thirteen members of the committee, and there was also a report signed by the same members of the committee recommending a law on the subject of secret combinations to take the place of section 3 of Chapter X. of the discipline on that subject. A minority of the committee, consisting of two members, joined in a minority report denying the authority of the general conference to alter or amend the constitution of the church without first securing the consent of the members of the church by a two-thirds vote. The majority report was adopted by the conference, and on a subsequent day of the conference the members of the church commission were chosen, as provided for in the report.

In pursuance of this action of the general conference, this church commission so chosen met in Dayton, Ohio, on the 17th day of November, 1885, and formulated a confession of faith and amended constitution, to be submitted to the members of the church for their approval or rejection, said revised confession of faith and amended constitution being as follows :

“REVISED CONFESSION OF FAITH.

“In the name of God, we declare and confess before all men the following articles of our belief :

“ARTICLE I.

“OF GOD AND THE HOLY TRINITY.

“We believe in the only true God, the Father, the Son, and the Holy Ghost ; that these three are one—the Father in the Son, the Son in the Father, and the Holy Ghost equal in essence, or being with the Father and the Son.

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"ARTICLE II.**"OF CREATION AND PROVIDENCE.**

"We believe this triune God created the heavens and the earth, and all that in them is, visible and invisible; that He sustains, protects and governs these with gracious regard for the welfare of man, to the glory of His name.

"ARTICLE III.**"OF JESUS CHRIST.**

"We believe in Jesus Christ; that He is very God and man; that He became incarnate by the power of the Holy Ghost, and was born of the Virgin Mary; that He is the Savior and Mediator of the whole human race, if they with full faith accept the grace proffered in Jesus; that this Jesus suffered and died on the cross for us, was buried, rose again on the third day, ascended into heaven, and sitteth on the right hand of God, to intercede for us; and that He will come again at the last day to judge the living and the dead.

"ARTICLE IV.**"OF THE HOLY GHOST.**

"We believe in the Holy Ghost; that He is equal in being with the Father and the Son; that He convinces the world of sin, of righteousness, and of judgment; that He comforts the faithful and guides them into all truth.

"ARTICLE V.**"OF THE HOLY SCRIPTURES.**

"We believe that the Holy Bible, Old and New Testaments, is the word of God; that it reveals the only true way to our salvation; that every true Christian is bound to acknowledge and receive it by the help of the Spirit of God as the only rule and guide in faith and practice.

"ARTICLE VI.**"OF THE CHURCH.**

"We believe in the Holy Christian Church composed of true believers, in which the word of God is preached by men

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divinely called, and the ordinances are duly administered; that this divine institution is for the maintenance of worship, for the edification of believers, and the conversion of the world to Christ.

"ARTICLE VII.

"OF THE SACRAMENTS.

"We believe that the sacraments, baptism and the Lord's Supper, are to be used in the church, and should be practiced by all Christians; but the mode of baptism and the manner of observing the Lord's Supper are always to be left to the judgment and understanding of each individual. Also, the baptism of children shall be left to the judgment of believing parents.

"The *example* of the washing of feet is to be left to the judgment of each one, to practice or not.

"ARTICLE VIII.

"OF DEPRAVITY.

"We believe that man is fallen from original righteousness, and apart from the grace of our Lord Jesus Christ, is not only entirely destitute of holiness, but is inclined to evil, and only evil, and that continually; and that except a man be born again he can not see the kingdom of heaven.

"ARTICLE IX.

"OF JUSTIFICATION.

"We believe that penitent sinners are justified before God only by faith in our Lord Jesus Christ, and not by works; yet that good works in Christ are acceptable to God, and spring out of a true and living faith.

"ARTICLE X.

"OF REGENERATION AND ADOPTION.

"We believe that regeneration is the renewal of the heart of man after the image of God through the word, by the act of the Holy Ghost, by which the believer receives the spirit

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of adoption, and is enabled to serve God with the will and the affections.

"ARTICLE XI.

"OF SANCTIFICATION.

"We believe that sanctification is the work of God's grace, through the Word and the Spirit, by which those who have been born again are separated in their acts, words and thoughts from sin, are enabled to live unto God, and to follow holiness, without which no man shall see the Lord.

"ARTICLE XII.

"OF THE CHRISTIAN SABBATH.

"We believe that the Christian Sabbath is divinely appointed; that it is commemorative of our Lord's resurrection from the grave, and is an emblem of our eternal rest; that it is essential to the welfare of the civil community, and to the permanence and growth of the Christian church, and that it should be reverently observed as a day of holy rest, and of social and public worship.

"ARTICLE XIII.

"OF THE FUTURE STATE.

"We believe in the resurrection of the dead; the future general judgment; and an eternal state of rewards in which the righteous dwell in endless life, and the wicked in endless punishment."

AMENDED CONSTITUTION.

"In the name of God, we, the members of the Church of the United Brethren in Christ, for the work of the ministry, for the edifying of the body of Christ, for the more speedy and effectual spread of the Gospel, and in order to produce and secure uniformity in faith and practice, to define the powers and business of the General Conference as recognized by this Church, and to preserve inviolate the popular will of the membership of the Church, do ordain this Constitution :

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“ARTICLE I.

“Section 1. All ecclesiastical power herein granted, to enact or repeal any rule or rules of discipline, is vested in a general conference, which shall consist of elders and laymen elected in each annual conference district throughout the Church. The number and ratio of elders and laymen, and the mode of their election, shall be determined by the General Conference.

“*Provided*, however, that such elders shall have stood as elders in the conferences which they are to represent for no less time than three years next preceding the meeting of the General Conference to which they are elected; and that such laymen shall be not less than twenty-five years of age, and shall have been members of the Church six years, and members in the conference districts which they are to represent at least three years next preceding the meeting of the General Conference to which they are elected.

“2. The General Conference shall convene every four years, and a majority of the whole number of delegates elected shall constitute a quorum.

“Sec. 3. The ministerial and lay delegates shall deliberate and vote together as one body; but the General Conference shall have power to provide for a vote by separate orders whenever it deems it best to do so; and in such cases the concurrent vote of both orders shall be necessary to complete an action.

“Sec. 4. The General Conference shall, at each session, elect bishops from among the elders throughout the Church, who have stood six years in that capacity.

“Sec. 5. The bishops shall be members *ex officio* and presiding officers of the General Conference; but in case no bishop be present, the conference shall choose a president *pro tempore*.

“Sec. 6. The General Conference shall determine the number and boundaries of the annual conferences.

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"Sec. 7. The General Conference shall have power to review the records of the annual Conferences, and see that the business of each annual conference is done strictly in accordance with the Discipline, and approve or annul as the case may require.

"Sec. 8. The General Conference shall have full control of the United Brethren Printing establishment, the Home, Frontier, and Foreign Missionary Society, the Church Erection Society, the General Sabbath School Board, the Board of Education, and Union Biblical Seminary. It shall also have power to establish and manage any other organization or institution within the Church.

"Sec. 9. The general conference shall have power to establish a court of appeals.

"Sec. 10. The general conference may—two-thirds of the members elected thereto concurring—propose changes in, or additions to, the confession of faith: *Provided*, That the concurrence of three-fourths of the annual conference shall be necessary to their final ratification.

"ARTICLE II.

"The general conference shall have power, as provided Article I., section 1, of this constitution, to make rules and regulations for the church; nevertheless, it shall be subject to the following limitations and restrictions:

"Section 1. The general conference shall enact no rule or ordinance which will change or destroy the confession of faith; and shall establish no standard of doctrine contrary to the confession of faith.

"Sec. 2. The general conference shall enact no rule which will destroy the itinerant plan.

"Sec. 3. The general conference shall enact no rule which will deprive local preachers of their votes in the annual conferences to which they severally belong.

"Sec. 4. The general conference shall enact no rule which will abolish the right of appeal.

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"ARTICLE III.

"Section 1. We declare that all secret combinations which infringe upon the rights of those outside their organization, and whose principles and practices are injurious to the Christian character of their members, are contrary to the word of God, and that Christians ought to have no connection with them.

"The general conference shall have power to enact such rules of discipline with respect to such combinations as in its judgment it may deem proper.

"Sec. 2. We declare that human slavery is a violation of human rights, and contrary to the word of God. It shall, therefore, in nowise be tolerated among us.

"ARTICLE IV.

"The right, title, interest, and claim of all property, both real and personal, of whatever name or description, obtained by purchase or otherwise, by any person or persons, for the use, benefit, and behoof of the Church of the United Brethren in Christ, are hereby fully recognized and held to vest in the church aforesaid.

"ARTICLE V.

"Section 1. Amendments to this constitution may be proposed by any general conference—two-thirds of the members elected thereto concurring—which amendments shall be submitted to a vote of the membership throughout the Church, under regulations authorized by said conference.

"A majority of all the votes cast upon any submitted amendment shall be necessary to its final ratification.

"Sec. 2. The foregoing amended constitution shall be in force from and after the first Monday after the second Thursday of May, 1889, upon official proclamation thereof by the board of bishops: *Provided*, That the general conference elected for 1889 shall be the lawful legislative body under the amended constitution, with full power, until its

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final adjournment, to enact such rules as this amended constitution authorizes."

The church commission established a plan of submission of the proposed revised confession and amended constitution to a vote of the members of the church, in which it was provided:

First. That the confession of faith as a whole should be submitted to a vote of the church, those favoring its adoption to have written or printed upon their ballots the words "Confession of Faith, Yes;" those opposed to its adoption to have written or printed upon their ballots the words "Confession of Faith, No."

Second. That the amended constitution as a whole should be submitted to a vote of the church members, with the following exceptions: Article I., in so far as it related to lay delegation in the general conference, to be voted upon separately; those favoring its adoption to have written or printed on their ballots the words "Lay Delegation, Yes;" those opposed, the words "Lay Delegation, No;" also, section 1, of article III., to be submitted separately, those favoring its adoption to have written or printed upon their ballots the words "Section on Secret Combinations, Yes;" those opposed, the words "Section on Secret Combinations, No;" those favoring the adoption of the remainder of the constitution to have written or printed on their ballots the words "Amended Constitution, Yes;" those opposed, the words "Amended Constitution, No." It was further provided that the vote should be taken during the month of November, 1888, and that the publishing agent at Dayton, Ohio, should furnish each presiding elder, three months before the time of voting, the necessary number of tickets and return blanks; the presiding elder to distribute them to the pastors in his district, and the pastors to distribute them in proper quantities to their several societies at least ten days before the time of voting. The pastor, leaders, and stewards of each society were constituted a local board of tel-

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lers, and it was made their duty on the day of voting to enroll the names of all who voted, and to receive no votes except those presented in person by the members on the day fixed for voting by the local board of tellers, except that where a member was incapacitated by age or sickness to attend, or a minister be absent on his charge, such persons were permitted to send their ballots with their names signed on the back thereof. The list of voters was required to be preserved for one year, and it was made the duty of each local board of tellers immediately to make a full report of the vote taken, on a blank provided for this purpose, to its annual conference board of tellers, who were to be elected by each annual conference at the session next preceding the time of voting; and these annual conference boards of tellers were required to receive the returns from the local boards of tellers in the bounds of the conference, and to count and transmit a full and accurate report of the same, on blanks provided, to the general board of tellers, on or before January 1st, 1889. Provision was also made in cases where the presiding elders or annual conferences neglected or refused to comply with instructions. A general board of tellers, consisting of seven persons, was constituted at Dayton, Ohio, whose duty it was to receive the reports from the annual conference boards of tellers, and to count and make a full and accurate report of the same to the board of bishops not later than the 15th day of January, 1889. The board of bishops were directed to prepare a letter addressed to the church on the work of the commission, to be published through the *Religious Telescope*—the official organ of the church—and otherwise, which was done in January, 1886, and the bishop's address, accompanied by the commission act, plan of submission, and proposed confession and constitution, were distributed generally throughout the church immediately thereafter.

During the month of November, 1888, the vote was taken in all respects as provided for in said plan of submission,

and the votes were counted and canvassed by the several boards of tellers, as therein provided, and the result of the vote was declared by the general board of tellers on the 15th day of January, 1889, and said result was published in the *Religious Telescope* on the 23d day of January, 1889; said result being declared to be as follows:

For the confession of faith 51,070
Against the confession of faith 3,310

For the amended constitution 50,685
Against the amended constitution 3,659

For lay delegation 48,825
Against lay delegation 5,634

For section on secret combinations 46,994
Against section on secret combinations . . . 7,298

That the total number of votes cast for
and against the several propositions was . . 54,369

The enrolled membership of the church in 1888 was 204,517, said enrollment being made by the preachers of the church under a disciplinary law, and that at the election, held in November, 1888, throughout the church for delegates to the general conference of 1889, at which election all the members of the church, without regard to age or sex, were entitled to vote, the total number of votes cast was 58,839.

The proclamation of the vote as above stated was agreed upon and signed at Chambersburg, Pennsylvania, May 6th, 1889, by all the bishops of the church except one, who was present but declined to sign; and the same was published in the official organs of the church, as required in the plan of submission adopted by the general conference.

A general conference of the church, composed of delegates duly and regularly elected under the laws, rules and regulations of the church, met at the York Opera House, in

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York, Pennsylvania, on Thursday, May 9th, 1889. On the second day of the conference the church commission, which had been established by the general conference of 1885, as above stated, submitted to the conference a report of the work done by it in connection with the amended constitution and revised confession of faith, embodying in said report the said constitution and confession of faith, the plan of submission, and the action and vote of the members of the church upon the several propositions submitted as stated above. This report was referred to a special committee of seven, with instructions to report to the conference whether the commission had acted in compliance with the instructions of the general conference, and whether the vote had been orderly and regular; and also to recommend to the conference such action as might be deemed proper to be taken in the premises. Five members of this committee, on Saturday, May 11th, 1889, submitted to the conference a report commending and approving the work of the commission, and recommending the adoption of the following resolutions:

“*Resolved*, By the general conference of the church of the United Brethren in Christ, in quadrennial session assembled in the city of York, Pennsylvania, May 9th, 1889, that the recorded proceedings of the commission, including the revised confession of faith and amended constitution, as formulated and submitted to the vote of the church, together with the methods of submission and all other acts by which the will of the church was ascertained thereon, are hereby approved and confirmed.

“2. That because of the truth that the revised confession of faith and amended constitution as a whole, and all the separate propositions thereof, submitted to the membership of our church, have been adopted by more than the required two-thirds of all the votes cast thereon, as required by the general conference of 1885, it is hereby declared and published by this conference, and for itself, that the said revised confession of faith and amended constitution, as framed

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and submitted by the lawfully constituted commission of the church, are become the fundamental belief and organic law of the church of the United Brethren in Christ, and will be in full force and effect on and after the 13th day of May, A. D. 1888, upon the proclamation of the bishops as provided and ordered in said amended constitution."

A minority report, signed by two members of the committee, was also submitted to the conference, reciting that the course of the church commission had been irregular in certain particulars therein specified, and suggesting that the general conference submit such amendments of the constitution to the vote of the people as it might deem wise and prudent, which should be regarded as a petition for such proposed changes. The report of the majority of the committee was adopted upon a roll call by a vote of 110 for to 20 against it.

On the 13th day of May, 1889, there was published in the *Religious Telescope* the proclamation of the board of bishops, signed by J. Weaver, J. Dickson, N. Castle, E. B. Kephart and D. K. Flickinger, duly qualified and acting bishops of the church, publishing and proclaiming the result of the vote of the church, in accord with the provisions of the general conference of 1885, said result being as above set forth; and announcing further that the result of said vote being the required two-thirds, they did thereby publish and proclaim the document thus voted to be the confession of faith and constitution of the church of the United Brethren in Christ.

On Monday, May 13th, 1889, after the proclamation of the board of bishops had been read to the general conference, fifteen of the twenty members who had voted against the adoption of the report of the committee as above stated, and who had, up to this time, been participating in the deliberations of the body, withdrew from the York Opera House, where the general conference was then being held, and met in a body at the Park Opera House in said city of York, and,

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after organizing, adopted a paper, which stated, in substance, that, inasmuch as one hundred and ten of the delegates and members of the general conference did, on May 11th, 1889, vote to adopt a new constitution and confession of faith, and did, on the 13th day of May, 1889, through the presiding bishop declare the same in force, thereby forming a new church, therefore they were declared to have thereby vacated their seats as members of the general conference of the church of the United Brethren in Christ. Daily sessions of this body were held until the following Saturday, when it adjourned *sine die*. It transacted business pertaining to the affairs of the church, claimed to be the true general conference of the church, and declared its adherence to the old constitution and confession of faith. The persons composing it, and those acting with them, have since been known and designated as "Radicals."

After the withdrawal of these members, the conference which had been in session at the York Opera House, continued its sessions each day until Tuesday, May 21st, when it adjourned *sine die*. It adopted a resolution reciting that, whereas, certain delegates—naming them—had actively participated in the proceedings of that body from its organization to the close of its third day's session, and had then vacated their seats and joined in the formation of another church organization, outside and separate and apart from the place properly and officially occupied by the lawfully elected general conference of the church, therefore resolved, that the aforesaid persons were declared as having irregularly withdrawn from that body and the church, and were, in view of these facts, no longer ministers or members of the Church of the United Brethren in Christ. It also adopted certain rules concerning insubordination of members of the church, and transacted other business pertaining to the church. This body, and those acting with it, have since been known and designated as "Liberals."

Those designated as "Radicals" have, since the general

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conference of 1889, adhered to the old constitution and confession of faith, and rejected the amended constitution and revised confession of faith; those known and designated as "Liberals" accept the revised confession of faith and amended constitution, and have been, since that time, acting thereunder and in conformity therewith.

The court further found that since the general conference of 1889, the doctrines and beliefs of the church, preached from the pulpits and taught in the Sunday schools of the church by both "Liberals" and "Radicals," have not been different in any respect from the doctrine preached or taught before said conference was held, and that the new, or revised, confession of faith is not unscriptural or antagonistic to the doctrines, creed, faith or belief of the church which existed at the time of the execution of the deed to the land in controversy.

The plaintiffs in this case have been duly elected trustees of said Sugar Grove Church, in all respects as required by the rules and regulations of the church, and were such when this suit was brought, and they and each of them accept the amended constitution and revised confession of faith, and claim to be acting thereunder and in harmony therewith.

The defendants have been duly elected trustees of said church, in all respects in conformity to the rules and usages of the church, but they adhere to the old constitution and confession of faith, and reject the amended constitution and revised confession of faith; and that when this suit was brought, they were in possession of the property in controversy, and were denying the plaintiffs' right to the possession thereof or the use of the same, and were excluding the plaintiffs from the possession and use thereof.

It appears by this statement of the facts in the case that there are two church organizations, each claiming to be the church known as the United Brethren in Christ.

The central question in the case is this: Which of these organizations is the church?

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A proper solution of this question depends upon the correct decision of numerous other legal questions which cluster around it, and upon which its solution depends.

In order to understand these questions, and to properly decide them in the order in which they are presented, it is necessary to state some of the general principles of law applicable to this class of cases, and by which they are governed.

The questions which have come before the civil courts concerning the rights to property held by ecclesiastical bodies have been divided into three classes, namely: *First.* Cases where the property which is the subject of controversy has been by deed, or will, of the donor, or other instrument by which the property is held, by the express terms of the instrument, devoted to the teaching, support, or spread of some specific form of religious doctrine or belief.

Second. To property held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and, so far as church government is concerned, owes no fealty or obligation to any higher authority.

Third. To cases of property held by a religious congregation, or ecclesiastical body, which is a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with general ultimate powers of control more or less complete, in some supreme judicatory over the whole membership of that general organization. *Watson v. Jones*, 13 Wallace, 679.

As to the first class, it may be said, there is no doubt that a person owning property in his own right may dedicate such property, by way of trust, to support and propagate any definite doctrines or principles, provided it does not violate any law of morality, and sufficiently expresses in the instrument by which the dedication is made the object of the trust. In such cases it is the duty of the courts, in a case properly made, to see that the property so dedi-

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cated is not diverted from the trust attaching to it, and so long as there are persons in interest, standing in such a relation to the property as that they have a right to direct its control, they may prevent the diversion of the property to any use different from that intended by the donor. If such trust is confided to a religious denomination or congregation it is not in the power of a majority of that denomination or congregation, however large the majority may be, by reason of a change of religious views, to carry the property thus dedicated to the support of a new and different doctrine.

Where it is alleged, in a cause properly pending, that property thus dedicated is being diverted from the use intended by the donor, by teaching a doctrine different from that contemplated at the time the donation was made, however delicate and difficult it may be, it is the duty of the court to inquire whether the party accused of violating the trust is teaching a doctrine so far at variance with that intended as to defeat the objects of the trust, and if the charge is found true, to make such orders in the premises as will secure a faithful execution of the trust confided. *Watson v. Jones, supra*; *Miller v. Gable*, 2 Denio, 492; *Attorney General, ex rel., v. Pearson*, 3 Mer. 353; *Watkins v. Wilcox*, 66 N. Y. 654; *Attorney General, ex rel., v. Town of Dublin*, 38 N. H. 459; *Happy v. Morton*, 33 Ill. 398; *Fadness v. Braunborg*, 73 Wis. 257.

But, to induce a court of equity to interfere, the case must present a plain and palpable abuse of trust.

In the case of *Fadness v. Braunborg, supra*, it was said by the court: "It is not the province of the courts of equity to determine mere questions of faith, doctrine, or schism not necessarily involved in the enforcement of ascertained trusts. * * * Courts deal with tangible rights, not with spiritual conceptions unless they are incidentally and necessarily involved in the determination of legal rights. Such trust, when valid and so ascertained, must of course be enforced; but to call for equitable interference there must

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be such a real and substantial departure from the designated faith or doctrine as will be in contravention of such trust." So, in *Happy v. Morton, supra*, it was said: "There must be a *real and substantial* departure from the purposes of the trust, such an one as amounts to a perversion of it, to authorize the exercise of equitable jurisdiction in granting relief." This language was quoted with approval in the case of *Lawson v. Kolbenson*, 61 Ill. 405.

In the case at bar the land was conveyed to the persons named in the deed as trustees, and to their successors in office, in trust for the church of the United Brethren in Christ, to have and to hold, the west half forever, without any exception, and the east half thereof "as long as said society, or the citizens of the neighborhood, may continue to use the meeting-house as a house of religious worship for the use of the members of the society of the United Brethren Church in the United States, *according to the rules and discipline* which from time to time may be agreed upon and adopted by the church *at their general conferences in the United States*, and in further trust and confidence that they shall at all times forever thereafter permit such ministers and preachers belonging to such church as shall from time to time *be duly authorized by the said general conference* to preach and expound God's holy word therein."

It is quite obvious from the language used in this deed that it was the intention of the donor to place the property, in a measure, under the control of the general conference, and that the house thereon used for public worship should be used by such minister or preachers as were authorized by such conference to preach. It is but reasonable also to presume that he did not intend that a doctrine antagonistic to that held by the United Brethren in Christ at the time of the donation should be preached in the house of worship situated upon the land.

In this case, however, there is an express finding of the circuit court that heard the evidence in the cause, to the effect

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“that since the general conference of 1889 the doctrines and beliefs of the church, preached from the pulpits and taught in the Sunday schools of the church, by both ‘Liberals’ and ‘Radicals,’ have not been different in any respect from the doctrines preached or taught before that conference was held.”

It is further expressly found by the circuit court “that the new or revised confession of faith is not unscriptural or antagonistic to the doctrines, creed, faith or belief of the church which existed at the time of the execution of the deed to the land in controversy.”

Assuming, without now deciding, that what is termed in these proceedings the new or revised confession of faith, has been legally adopted, and is now the confession of faith of the church, we are unable to discover such an antagonism between it and the old confession of faith, as does, in our opinion, amount to a perversion of the trust. It can not be said that there is a *real, substantial* departure from the purposes of the trust, such as would authorize the exercise of the equitable jurisdiction of the courts to grant relief, or that there is a plain and palpable abuse of the trust which calls for the interference of the courts.

There is no claim by either of the parties that this case falls within the rules governing the second class above named, and for that reason such rules need not be examined here.

And this brings us to an examination of the rules of law governing the third class to which, it is conceded by all the parties to this controversy, the case now under consideration belongs.

It may be remarked, at the outset, that the civil courts in this country have no ecclesiastical jurisdiction. There is a complete separation of church and state. Every one has the legal right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality or property, and which does not infringe the personal rights of oth-

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ers, which may seem to him right and proper, without any interference from the courts. The law here knows no heresy, and is committed to the support of no dogma. It recognizes the right of the people to organize voluntary religious associations, to assist in the dissemination of any and all religious doctrines, with the exceptions above named, and to create tribunals for the decision of controverted questions of faith, and for ecclesiastical government of all the individual members, congregations, and officers within the general association.

All who unite with such associations, when so organized, impliedly consent to submit to such government. From these considerations the rule in this country has become elementary that, when a civil right depends upon some matter pertaining to ecclesiastical affairs, the civil tribunal tries the right, and nothing more, taking the ecclesiastical decisions out of which the civil right has arisen as it finds them, and accepts such decisions as matters adjudicated by another legally constituted jurisdiction. *White Lick, etc., v. White Lick, etc.*, 89 Ind. 136; *Watson v. Jones, supra*; *Dwenger v. Geary*, 113 Ind. 106; *Connitt v. Reformed, etc., Church*, 54 N. Y. 551; *Gaff v. Greer*, 88 Ind. 122; *Harrison v. Hoyle*, 24 Ohio St. 254.

In the case of *White Lick, etc., v. White Lick, etc., supra*, this court said: "The civil courts act upon the theory that the ecclesiastical courts are the best judges of merely ecclesiastical questions, and of all matters which concern the doctrines and discipline of the respective religious denominations to which they belong. When a person becomes a member of a church he becomes so upon the condition of submission to its ecclesiastical jurisdiction, and however much he may be dissatisfied with the exercise of that jurisdiction, he has no right to invoke the supervisory power of a civil court so long as none of his civil rights are invaded."

In the case of *German Reform Church v. Seibert, ex rel.*, 3 VOL. 129.—33

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Bar. 291, it was said by the court: "The decisions of ecclesiastical courts, like every other judicial tribunal, are final; as they are the best judges of what constitutes an offence against the word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt, which would do anything but improve either religion or good morals."

In this case it is contended by the appellants that the new constitution and the revised confession of faith were never legally adopted, and that those acting under such constitution and confession of faith have created a new organization, which is not the church of United Brethren in Christ, while they, adhering to the old constitution and the old confession of faith, which are still in force and unchanged, constitute the church, and that they are for that reason entitled to hold and control the property in controversy.

We think it must be true that if the old constitution and the old confession of faith have never been legally changed, and are still in force, those adhering thereto constitute the church; while, on the other hand, if they have been legally changed and the new constitution and new confession are now the confession of faith and constitution of the church of the United Brethren in Christ, those who refuse to accept and act under them are to be regarded as seceders, and no longer members of that church, and have no right to control its property.

In this connection it is contended by the appellants that the constitution could not be changed or amended without a previous request of two-thirds of the entire membership of the church, and that a vote of less than two-thirds of the entire membership was not sufficient to authorize such amendment.

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While Article IV. of the constitution of 1841 prohibits the general conference from making any alteration in that instrument unless by request of two-thirds of the whole society, it is to be observed that it is silent as to the time at which such request shall be made, as well as the manner of making it.

It can not be successfully maintained that the general conference of 1885, or the commission provided by its action, made any change in the constitution or in the confession of faith. The most that can be said of the action of that conference is that it adopted a plan by which the sense of the society might be taken upon the propriety of making certain amendments to the constitution and of revising the confession of faith.

When those proposed changes were submitted to a vote of the members of the society, it is said that less than two-thirds voted thereon, and that even if the vote could be treated as a request for such changes, it did not amount to a request of two-thirds of the whole society, as provided in the constitution itself.

It is undoubtedly true that organic law can not be changed in any other manner than that provided by the instrument itself, where it provides for an amendment or change, so the question is fairly presented as to whether the vote in favor of the amended constitution is to be regarded as a compliance with the constitutional requirements relating to amendments. And this involves, to some extent, the legal mode of ascertaining the number of legal voters at a given election. Upon this subject Mr. McCrary, in his work on Elections, says: "Where a statute requires a question to be decided, or an officer to be chosen, by the votes of 'a majority of the voters of a county,' this does not require that a majority of all persons in the county entitled to vote shall actually vote affirmatively, but only that the result shall be decided by the majority of the votes cast, provided always that there is a fair election and an equal opportunity for all to participate.

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In such a case the only proper test of the number of persons entitled to vote is the result of the election as determined by the ballot-box, and the courts will not go outside of that to inquire whether there were other persons entitled to vote who did not do so. The 'voters of the county, referred to by all such statutes, are necessarily the voters who vote at the election, since the result in each case must be determined by a count of the ballots cast, and not by an inquiry as to the number not cast.' " McCrary Elec. (3d ed.), section 173. In support of the text are cited *People, ex rel., v. Warfield*, 20 Ill. 160; *People, ex rel., v. Garner*, 47 Ill. 246; *People, ex rel., v. Wiant*, 48 Ill. 263; *Louisville, etc., R. R. Co. v. County Court of Davidson*, 1 Sneed, 636; *Angell & Ames Corp.* (9th ed.), sections 499-500; *City of Bridgeport v. Housatonic R. R. Co.*, 15 Conn. 475; *Talbott v. Dent*, 9 B. Mon. 526; *State v. Mayor, etc.*, 37 Mo. 270; *St. Joseph Tp. v. Rogers*, 16 Wall. 644; *Cass County v. Johnson*, 5 Otto, 369, which fully support it. It is said in some of these authorities that all who absent themselves from the election are presumed to assent to the will of the majority of those voting. Those who refrain from voting must be presumed to know the law, and that they will be counted as assenting to the will of those who cast the required number of votes.

If we are to take the number of votes cast for and against the amended constitution and revised confession of faith as constituting the whole number of legal voters belonging to the society at the time of the election there were much more than two-thirds of the society expressing themselves in favor of the change, but if we assume, as contended by the appellants, that we are to go beyond the vote cast and inquire into the actual number of voters attached to the church, we have more than two-thirds of the vote cast favoring the amended, and a still larger number acquiescing therein. But we are of the opinion that the number of votes cast at the election is to be considered, for the purposes of this case, as constituting the number of legal voters be-

longing to the church. Any other rule would be impracticable, and would lead to endless confusion and contention.

As we have already said, the conference of 1885 did not amend the constitution or revise the confession of faith of the church, but formulated a plan looking to that end.

When the conference of 1889 met at York, Pennsylvania, the commission on revision reported to it the formulated amended constitution and revised confession of faith, together with the result of the vote thereon. That body after a consideration of the whole matter resolved that the revised confession of faith and amended constitution, as framed and submitted by the lawfully constituted commission of the church, had become the fundamental belief and organic law of the Church of the United Brethren in Christ, and that it would be in full force and effect from and after the 13th day of May, A. D. 1889, upon the proclamation of the bishops as provided and ordered in the amended constitution.

It is not denied that either the conference of 1885 or 1889 was, in fact, the conference of the United Brethren Church, legally elected and organized, but it is asserted that it had no jurisdiction to change the constitution or revise the confession of faith.

As bearing upon this question it must not be forgotten that the constitution of 1841 was framed and adopted by a general conference, and went into force without submission to a vote of the members of the church. It remained the organic law of the society from that date until 1889, a period of more than forty years, and so far as we are able to ascertain from the record before us, the power of the conference to make and adopt such an instrument was not questioned.

In the case of *Chase v. Cheney*, 10 Am. Law Reg. (N. S.) 295, it was decided that the decision of an ecclesiastical court upon an ecclesiastical matter, as to its own jurisdiction, was conclusive upon the civil courts.

It has been held in this State by repeated decisions, that

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where a court of limited jurisdiction has jurisdiction to proceed, and does proceed, the same presumptions prevail in favor of its action, and in favor of the verity of its record, as if its powers were general, and that where such a tribunal is required to ascertain and decide upon facts essential to its jurisdiction, its judgment thereon can not be attacked collaterally. *Stout v. Woods*, 79 Ind. 108; *State v. Wenzel*, 77 Ind. 428; *Featherston v. Small*, 77 Ind. 143; *Stoddard v. Johnson*, 75 Ind. 20; *Ricketts v. Spraker*, 77 Ind. 371.

It will scarcely be denied that the general conference, which is the highest legislative and judicial body in the church, has power to determine what is the constitution under which it acts, and to determine what is the confession of faith of the church which it represents.

The question as to whether the old confession of faith and the old constitution had been superseded by the new was a question that squarely confronted the conference of 1889.

Assuming that the action of commission on revision, coupled with the action of the conference of 1885, and vote upon the subject of revision and amendment, gave it jurisdiction in the premises, the general conference of 1889 adjudged and declared that what appears in the record before us as the revised confession of faith and amended constitution, was in fact the fundamental belief and constitution of the church of the United Brethren in Christ in the United States.

Who shall question the correctness of its decision or revise it? The civil courts? To do so would be to assume ecclesiastical jurisdiction, a jurisdiction they do not possess. It was clearly an ecclesiastical matter, pertaining to the government of the church, and the church, through its legally constituted tribunal, having adjudicated the matter, we think the civil courts are bound by such adjudication.

It follows that what appears in the record before us as the amended constitution and revised confession of faith are the constitution and confession of faith of the church known as

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the United Brethren in Christ, and that those who adhere to them constitute the church, while those who refuse to do so must be regarded as seceders.

But it is urged that the confession of faith was never legally changed, because the constitution of 1841 forbade any change therein.

It is not denied that such confession of faith could be made after a change in the constitution. We know of no reason why the question of revision of confession of faith might not be submitted with a proposition to amend the constitution. The question of construing the constitution of 1841 was purely for the church authorities. They determined that both questions could be submitted together, and the conference of 1889 have adjudged that this was legally done. This being a purely ecclesiastical matter, we have no power to review their decision. It is binding upon us as well as the members of the church, and so we must hold that the confession of faith was legally revised.

It follows from what we have said that the circuit court did not err in its conclusions of law upon the facts as stated in this record.

Judgment affirmed.

MCBRIDE, J., took no part in the decision of this cause.

Filed Nov. 6, 1891.

No. 16,190.

STALCUP v. THE STATE.

CRIMINAL LAW.—*Larceny.*—*Sufficiency of Evidence.*—For evidence held sufficient to sustain a conviction for larceny of a horse, see opinion.

NEW TRIAL.—*Newly-Discovered Evidence.*—*Diligence.*—A new trial will not be granted on the ground of newly-discovered evidence where such evidence is merely cumulative, and no diligence is shown to have been used to ascertain and produce it at the trial.

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From the Greene Circuit Court.

W. F. Gallemore, for appellant.

A. G. Smith, Attorney General, for the State.

OLDS, J.—The appellant was indicted for grand larceny, charged with the stealing of a horse, the property of one Nancy Custer, of the value of one hundred dollars. The cause was submitted to the court for trial. The defendant was found guilty, and sentenced to two years' imprisonment in the State prison.

The appellant filed a motion for a new trial, which was overruled, and exceptions reserved, and the ruling assigned as error.

It is contended by counsel for the appellant that the judgment ought to be reversed, for the reason that the evidence is insufficient to support the finding of the defendant guilty by the court.

The evidence shows that the horse was taken from where it was fastened at a church in the town of Bloomfield, about 7 o'clock in the evening; that parties saw it taken, and the person was immediately pursued, and some two miles from the place from where the horse was taken, and near another church, called Bethel Church, the horse was found loose in the highway, warm and tired. Three persons followed in pursuit of the horse and the person taking it. They testify to having ridden very rapidly, and that the roads were muddy, and they made considerable noise.

There is an abundance of evidence identifying the appellant as being in the town of Bloomfield on that evening, and at the church about the hour the horse was taken. Indeed, he admits being there, and a number of persons identify him as the person who unloosed the horse, by unsnapping the hitching-strap and leaving it tied to the hitching-post or fence, and getting upon the horse and riding it away; the witnesses being at the time but a short distance from appellant, and some of them immediately notified the person who

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had ridden the horse to the church and hitched it, and he and two others immediately made pursuit to recover the horse.

There is also no controversy about the fact that appellant was at Bethel Church, near where the horse was found, when the persons in pursuit reached there. And a number of witnesses testify that he came in late, and but a short time before those in pursuit reached the place.

The appellant testifies in his own behalf, and denied having taken or ridden the horse, or having any knowledge of its being taken.

When the persons in pursuit reached Bethel Church some of their number went into the church during the services and invited one or two persons out, and they came out; that the appellant, without invitation, followed the others out, and on inquiry being made about who came into church late, appellant stated, in substance, that he could prove how he came there, though there seems to have been no charge made against him at that time. The fact of taking the horse in such a public manner, and riding it the distance which it was ridden, and turning it loose, of itself might indicate that the object in taking the horse was solely for the purpose of riding it to the Bethel Church, and turning it loose without any real intent to commit a larceny. But, on the other hand, though the evidence is seemingly conclusive as to the identification of the appellant, he denies having taken the horse, and the fact that quick and rapid pursuit is made by three young men, making considerable noise, affords strong proof that the defendant, though having intended to commit a larceny of the horse, and starting at a rapid gait to make good his escape, finding himself pursued, abandoned the horse and entered the church to avoid detection.

The evidence is of such a character as to support a conviction, and can be best weighed and the proper conclusions reached by the trial court. The judge of that court in hearing the evidence looks into the face of all the witnesses, including that of the appellant when testifying in his own be-

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half, and it is a case illustrating the soundness of the long-established rule of this court, that where there is evidence in support of the verdict it will not weigh the evidence, as this court has merely the recorded statements of the witnesses, without any of the other tests which may add to, or take from, the mere statement of a witness. We can not reverse the judgment on account of the insufficiency of the evidence.

A new trial is also asked on account of surprise and newly discovered evidence.

There is no merit whatever in the application on these reasons. It is shown that two witnesses who would, if they had been present, have testified to facts having some materiality, were at work over in the State of Illinois, and in correspondence with them they agreed to be present, either to be in the county, at their father's the evening before the trial, or come to the trial on the 10 o'clock A. M. train on the day of the trial. Relying alone upon their promises, knowing they were not present, appellant went into the trial without any effort to get their testimony, or any application for delay or continuance. It would not do to grant new trials for such reasons. The appellant had the right to have this evidence if he had used diligence. He used no diligence, and abandoned his right to have their testimony, and took his chances on getting it by relying on their promise.

The newly discovered evidence is merely cumulative, but no diligence whatever is shown to have been exercised toward ascertaining and producing it upon the trial.

There is no error in the record.

Judgment affirmed.

Filed Nov. 4, 1891.

Shideler v. The State.

No. 16,146.

SHIDELER v. THE STATE.

CRIMINAL LAW.—*Former Acquittal Procured by Fraud.*—*Subsequent Prosecution.*—*Collateral Attack.*—Where a prosecution is regularly commenced by the prosecuting attorney, and the State is represented throughout by him, but pending the prosecution the prosecuting attorney is bribed to procure an acquittal, the judgment of acquittal thus procured is not void because of the fraud, but only voidable, and can not be collaterally attacked by the State.

From the Madison Circuit Court.

F. P. Foster, W. A. Kittinger and L. M. Schwinn, for appellant.

A. G. Smith, Attorney General, and *A. C. Carver*, Prosecuting Attorney, for the State.

MCBRIDE, J.—On the 18th day of April, 1890, an affidavit was made before the clerk of Madison county, charging the appellant with the crime of bigamy. The prosecuting attorney for that judicial circuit, on the same day, filed the affidavit in the clerk's office of that county, together with an information based thereon. The records of the Madison Circuit Court show that, on the 19th day of May, 1890, the appellant was arraigned and entered a plea of not guilty, was tried by the court and acquitted, and that throughout the State was represented by the prosecuting attorney. September 22d, 1890, he was indicted by the grand jury of that county for the same offence, and on being arraigned he filed a plea of former acquittal. A reply was filed alleging that the former acquittal was procured by fraud. A demurrer to the reply was overruled; there was a plea of not guilty, and a trial which resulted in the conviction of the appellant, and he was sentenced to two years' imprisonment in the State prison.

The judgment of conviction can only be sustained by treating the judgment of acquittal in the first proceeding as absolutely void and ignoring it. Can this be done?

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Waiving any question as to the technical sufficiency of the reply, the facts, as the State claims to have established them by evidence on the trial, and which are relied upon as sufficient to justify the collateral attack on the judgment of acquittal, are substantially as follows: That, after the commencement of the first prosecution, persons acting in the interest of the appellant corrupted the prosecuting attorney by paying him a bribe of \$500 to connive at appellant's escape from punishment; that, although the fact of appellant's guilt was beyond controversy, and the evidence ample to secure a conviction, the witnesses for the State, who had arranged with the prosecutor to come, and who would have come at any time on notice, were not subpoenaed, or in any other way notified of the time of the trial, and were none of them present; that the prosecutor and the appellant went into court together without witnesses, a plea of not guilty was entered, and the case submitted to the court for trial without a jury; that the only evidence adduced was the statement of the accused and two *ex parte* affidavits produced by him; that this was all in accordance with said corrupt arrangement to secure the appellant's escape from punishment; and that it was upon such presentation of the case alone that the finding and judgment of acquittal were based.

It has been many times decided, and may be regarded as settled law, that if one procures himself to be prosecuted for an offence which he has committed, thinking to get off with slight punishment, or none, and to thus bar a prosecution in good faith by the State for the same offence, if the proceeding is really managed by himself, either directly or through the agency of another, and the State, while a party in name, is not so in fact, and has no actual agency in the matter, the judgment thus procured is void, and affords no protection. 1 Bishop Crim. Law, section 1010; Archbold Crim. Prac. and Pl. 352 (note by the American editor); *Watkins v. State*, 68 Ind. 427; *Halloran v. State*, 80 Ind.

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586; *Ice v. State, ex rel.*, 123 Ind. 590; *Gresley v. State, ex rel.*, 123 Ind. 72; *State v. Lowrey*, 1 Swan, 34; *State v. Glenney*, 1 Head, 270; *State v. Colvin*, 11 Humph. 599; *State v. Yarbrough*, 1 Hawks, 78; *Commonwealth v. Dascom*, 111 Mass. 404; *Commonwealth v. Alderman*, 4 Mass. 477; *State v. Little*, 1 N. H. 257; *State v. Wakefield*, 60 Vt. 618; *Commonwealth v. Jackson*, 2 Va. Cases, 501; *State v. Epps*, 4 Sneed, 551; *State v. Green*, 16 Iowa, 239; *State v. Atkinson*, 9 Humph. 677; *State v. Brown*, 16 Conn. 54; *State v. Simpson*, 28 Minn. 66 (41 Am. Rep. 269); *McFarland v. State*, 68 Wis. 400; *State v. Cole*, 48 Mo. 70.

While the judgments in such cases as those above cited are fraudulently procured, and are frequently said to be void because of the fraud practiced, it is apparent that a better reason for holding them void, and not binding upon the State is, that the State is not a party to them.

The State can no more be bound by a judgment to which it is not a party than a citizen of the State can. If A. and B. engage in litigation, and during its pendency B. corrupts A.'s attorney, and through him procures the rendition of a judgment unjust to A. and enuring to B.'s advantage, although the judgment is thus tainted by fraud, if the court had jurisdiction of the subject-matter, and the proceedings are apparently fair and regular on their face, the judgment is not void and can not be attacked collaterally.

A judgment rendered under such circumstances is voidable, and the court rendering it will promptly set it aside on the fraud being shown. Freeman Judg. 99.

A court of equity will also give relief from a judgment thus procured. Black Judg., section 919; Freeman Judg. 486, *et seq.*; Pomeroy Eq. Jur. 919.

The attack, however, must be direct and not collateral. Black Judg., section 290, *et seq.*, and cases cited.

If, however, B., without the knowledge or consent of A., and wholly without authority, personates him, or procures another to personate him, and prosecutes a suit in A.'s name,

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but actually in the interest of B., whereby a judgment is rendered to the disadvantage of A., and advantage of B., it would be contrary to all principles of justice to hold that A. was, in any manner, or to any extent, bound by such judgment. Never having been a party to it, or having any notice or knowledge of the proceeding, he may treat it as a nullity, and may attack it collaterally as the State was allowed to do in each of the several cases cited.

In speaking of such cases, Bishop well says: "He (the defendant) is, while thus holding his fate in his own hand, in no jeopardy. The plaintiff State is no party in fact, but only such in name; the judge is imposed upon indeed, yet in point of law adjudicates nothing; all is a mere puppet show, and every wire moved by the defendant himself." 1 Bishop Crim. Law, section 1010.

The Supreme Court of New Hampshire, in *State v. Little*, *supra*, suggest a query, whether a judgment can ever be regarded as fraudulent and void when the State has been actually represented by its proper prosecuting officer.

We have been unable to find any case in the books presenting the peculiar features of the case at bar, where the courts have considered the sufficiency of a judgment thus procured as a defence to another prosecution for crime.

Here, the first prosecution was commenced regularly, and in good faith, and the State was represented throughout by its regularly authorized officer and agent, the prosecuting attorney. The charge is that pending the prosecution the prosecuting attorney was corrupted, and paid to secure an acquittal instead of a conviction. So far as disclosed by the record, the prosecution proceeds with regularity throughout.

The arraignment, plea, and submission are regular, but the trial is a farce.

The distinction between such a case and those cited is at once apparent, and is very broad. While the baseness of an officer who will thus prostitute his office can not be too severely condemned, and while he should receive prompt and

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severe punishment, our indignation should not be allowed to blind us to the principle involved. Our anxiety to rectify this wrong done, and punish the wrong-doer, should not lead us to violate established principles of law in our efforts to do so.

In the first prosecution the court had jurisdiction both of the subject-matter and of the parties. As above stated, the proceedings were regular up to and including the submission, and are not void. The steps taken were the usual, proper and necessary steps in such a case, except that the defendant had the right to a jury trial, instead of a trial by the court. It is not pretended, however, that the judge was corrupt, or that his action was not characterized throughout by the highest and purest motives, and most sincere devotion to duty. When the cause was submitted for trial, jeopardy attached; so that, even if the extreme position were taken, and the trial regarded as a nullity, and the judgment absolutely void, we could expunge both from the record, and there would still remain a valid prosecution pending, awaiting trial.

Upon the other hand, if the former judgment, while voidable because of the fraud, is not void (which is our opinion), it is not open to collateral attack. In either view of the case, it follows that the court erred in ignoring the first prosecution, and in allowing a new and independent prosecution to be maintained. Whatever rights the State has must be worked out in the original proceeding. The views we have expressed necessarily lead to a reversal.

It is unnecessary, and would be premature, for us to decide, at this time and in this case, what will be proper procedure for the State in the future conduct of this matter. We will only say that the question is not free from difficulty. It has, however, received consideration from those learned in the law, and some interesting and valuable suggestions will be found in 1 Bishop Crim. Law, section 1008 and 1009.

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See, also, *Rex v. Bear*, 2 Salk. 646; *State v. Tilghman*, 11 Iredell, 513; *State v. Sweepson*, 79 N. C. 632.

Judgment reversed.

Filed Oct. 6, 1891.

ON PETITION FOR A REHEARING.

MCBRIDE, J.—A petition for a rehearing by the State is based on an evident misapprehension of the scope and effect of the original opinion.

While it is true that a prosecution which is in fact instituted and carried on to final judgment by or in the interest of a guilty person, to enable him to defeat justice, and escape merited punishment (he in person, or by his instruments managing both sides), may be treated as void by the State, and ignored, on the ground that the State is not in fact in any sense a party to it, and therefore not bound by it, *this is not true where the State is in fact a party to the proceeding*. Where a prosecution is in fact regularly commenced by the prosecuting attorney, and is thereafter carried to final judgment, the State being represented throughout by its sworn officer, the prosecuting attorney, such judgment is not void because the prosecutor was corrupted during the pendency of the proceeding. *The State is a party to such judgment*. The conduct of its unworthy representative, conspiring with the guilty party may render it voidable, but it can not be ignored.

Petition for rehearing overruled.

Filed Nov. 21, 1891.

Meikel *et al.* v. Borders.

No. 15,368.

MEIKEL ET AL. v. BORDERS.

GUARDIAN AND WARD.—*Order of Sale of Ward's Realty.—Collateral Attack Upon.*—Where a court, having jurisdiction over the subject-matter and the parties, orders a sale of the wards' land upon a petition filed by their guardian, and approves the same, it can not be collaterally attacked because of certain irregularities in the proceedings whereby the land was sold for less than the amount of the appraisement.

SAME.—*Acquiescence in Sale.*—Persons claiming an adverse title under the ancestor can not, if the wards permit the sale to stand, attack it because of irregularities in the proceedings, as they are not injured thereby.

VENDOR AND PURCHASER.—*Failure to Record Deed.—Bona Fide Purchaser.*—Where a deed is not recorded within the time provided by sections 2926 and 2931, R. S. 1881, a subsequent purchaser for value and in good faith from the original grantor or his heirs acquires the better title.

SAME.—*Bona Fide Purchasers.—Quitclaim Deeds.*—A grantee of land by a warranty deed, who acts in good faith and without notice, is entitled to protection as a *bona fide* purchaser, notwithstanding the fact that his grantor held by a quitclaim only.

From the Pulaski Circuit Court.

E. P. Ferris, W. W. Spencer and J. S. Ferris, for appellants.

N. L. Agnew and B. Borders, for appellee.

MILLER, J.—The appellee instituted this action to quiet his title to a tract of land in Pulaski county. The cause was tried by the court, and, at the request of the parties, the court made a statement of the facts and its conclusions of law upon them.

The facts found by the court that must be decisive of this case are, substantially, as follows :

That, on December 15th, 1871, Augustus D. Wood, who was the owner of the land in controversy, conveyed the same, by a general warranty deed, to Caroline M. Meikel, but the deed was not recorded until June 9th, 1885.

Caroline M. Meikel paid nothing for the land, and had no

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personal interest in it, but held the same in trust for the use and benefit of Caroline L. Meikel, who died October 6th, 1879, leaving the appellants and Mary E. Meikel, who was the mother of the appellants, as her heirs at law; that on the 8th day of June, 1885, Caroline M. Meikel, with the knowledge and consent of Mary E. Meikel, conveyed the land by quitclaim deed to the appellants. This makes the chain of title upon which the appellants rely.

The appellee's chain of title is as follows:

Augustus D. Wood, under whom both parties claim title, died January 1st, 1879, leaving a widow, Elizabeth D. Wood, and two minor children as his only heirs at law. On April 14th, 1881, his widow sold and conveyed an undivided one-third interest in the land by a quitclaim deed to Moses A. Diltz.

A petition was filed by the guardian of the Wood heirs in the Putnam Circuit Court, where they then resided, for the sale of their interest in this land. It was made to appear to the court that the taxes on the land amounted to \$40.30, and the ditch assessments to \$382.58; that such proceedings were had that on the 26th day of April, 1881, the guardian reported that the land had been appraised at \$240, and that the taxes delinquent amounted to \$40.30, and the drainage assessments were \$382.58, and that he had sold the interest of his wards in the land at private sale, without notice, to Moses Diltz for \$56.66, cash, subject to the tax and ditch assessments. This report was approved by the court, and the guardian authorized to make a deed to the purchaser, which was done, and the same was approved by the court and delivered. Moses A. Diltz caused both of these deeds to be recorded on May 18th, 1881; the land remained unenclosed from 1870 to 1881.

It is found that the purchaser at the guardian's sale represented the amount of the encumbrances resting upon the land to be much greater than the true amount, and that he consequently obtained his title for less than the appraised

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value of their interest in the property ; that on the 10th day of May, 1881, Moses A. Diltz sold and conveyed the land, by a general warranty deed, subject to ditch taxes and assessments, to the appellee for \$450, of which sum \$250 was paid in cash at the time of the conveyance, and the remainder in one and two years ; that, when the appellee purchased the lands, he had no knowledge of the existence of the unrecorded deed, nor of the facts connected with the procurement of the guardian's deed, except so far as disclosed by the records, but was a *bona fide* purchaser, paying \$450 for the land, which was its full value.

The conclusions of law deduced by the court from the foregoing facts, were :

" 1st. The irregularities in the proceedings upon the guardian's sale do not render the guardian's deed void, the court having jurisdiction over the subject-matter and the parties.

" 2d. Though notice of the existence of the unrecorded deed, and fraud in the procurement of the guardian's deed, might be inferred against Diltz, yet the plaintiff, being a *bona fide* purchaser for a valuable consideration, is not affected by these facts.

" 3d. The fact that Augustus D. Wood made a conveyance of this property to the defendants' grantors does not prevent the plaintiff, as a *bona fide* purchaser, for a valuable consideration, from acquiring a good title from the heirs of Wood as against the unrecorded deed of Wood ; that the plaintiff is the owner of the land in dispute, and is entitled to have his title quieted as against the defendants, and to recover his costs."

We are of the opinion that the court did not err in any of its conclusions of law.

The record shows that the Putnam Circuit Court acquired jurisdiction of the proceedings to sell the land upon a petition by the proper guardian, and that each step was taken under its supervision, and the sale of the land and deed to Diltz were approved by the court. This judgment is con-

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clusive when questioned collaterally. *Walker v. Hill*, 111 Ind. 223 (235); *Dequindre v. Williams*, 31 Ind. 444; *Worthington v. Dunkin*, 41 Ind. 515; *Davidson v. Koehler*, 76 Ind. 398; *Pepper v. Zahnsinger*, 94 Ind. 88.

Another reason why the appellants can not be the beneficiaries of the irregularities in the proceedings for the sale of the real estate by the guardian is the fact that they were not injured by them. The only defect pointed out in the proceedings is the failure to sell the land for its full value, or for the amount of its appraisement. This was a matter of concern for the Wood heirs, but not for the appellants. If the wards permit the sale to stand, the appellants will be compelled to content themselves therewith.

Counsel for the appellants suggest that the widow and children of Augustus D. Wood could convey no title to Diltz, because they had none to convey. This would entirely abrogate the provisions contained in the statute, sections 2926 and 2931, R. S. 1881, requiring conveyances to be recorded within forty-five days from their execution, and providing that if they are not so recorded, they shall not be valid as against any subsequent purchaser, in good faith, and for a valuable consideration. No man owns land after he has conveyed it away. The widow and children of Wood had as much title to the land as he would have had if living. Neither could have any actual title, but they appeared to have one, and the grantee having failed to record her deed within the time limited, a good-faith purchaser from the original grantor or his heirs would obtain the better title. *Earle v. Fiske*, 103 Mass. 491; *Pierce v. Spear*, 94 Ind. 127; *Nitche v. Earle*, 88 Ind. 375.

It is also suggested that, inasmuch as the appellants had only an equitable title, therefore the failure to record the deed to Caroline M. Meikel could not affect their rights. The cases of *Wright v. Shepherd*, 47 Ind. 176, and *Combs v. Nelson*, 91 Ind. 123, do not sustain this position. They are both cases in which the persons under whom the parties

claimed title never held the legal title, and all that is decided is that the provisions of section 2931, *supra*, has no reference to equities.

In this case the title under which the appellee claims is the legal title. Also, the deed to Caroline M. Meikel not having been recorded, the appellee, if an innocent purchaser, is not chargeable with notice of such conveyance, nor of latent trusts behind it.

It is contended, mildly, that, the conveyance from Mrs. Wood to Diltz being a quitclaim, and the guardian's deed being in effect the same, the purchaser could not be a good-faith purchaser, so as to be protected against the unrecorded conveyance under which the appellants claim title.

The question thus presented is a troublesome one, which, although somewhat discussed in *Hastings v. Brooker*, 98 Ind. 158, has never been decided by this court. Outside of this State the authorities are said to be in a "distressing conflict." SPEER, J., in *Woodward v. Jewell*, 25 Fed. R. 689.

The weight of authority, particularly of the more recent cases, hold that when a party takes a quitclaim deed he is put upon inquiry as to the title; that the very form of the deed indicates to him that the grantor has doubts concerning the title, and the deed itself is notice to him that he is getting only a doubtful title. In such cases it is held that a prior unrecorded deed will prevail against a subsequent quitclaim deed first recorded.

On the other hand, many eminent courts have held that a conveyance by a quitclaim, received in good faith and for a valuable consideration, first recorded, will prevail over such prior unrecorded deed. Fortunately the facts in this case do not require us to review or even cite the numerous cases bearing upon this question.

The finding shows that the appellee received a general warranty deed from his immediate grantor, and that he was a *bona fide* purchaser for full value, and without notice of

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the unrecorded deed. Such being the case, the law applicable is thus stated in a late work. 2 Warvelle Vendors, 616 :

"Section 14. *Purchaser from grantee by quitclaim.* Conceding the rule that where a person purchases from another who is willing to give only a quitclaim deed, he may properly be regarded as charged with notice of defects and outstanding equities in his grantor's title, it does not seem that this principle can be extended to a subsequent purchaser who takes from such grantee by a deed with warranty. The subsequent purchaser, it may be presumed, pays what the parties deem the value of the property, and upon the assumption that he is acquiring a valid title. It has been held, therefore, that he can not be affected by the mere fact that he takes through a quitclaim deed. The justness of such a ruling is apparent without demonstration, for it is not unreasonable to suppose that quitclaim deeds occur in the lives of many titles where there are no outstanding equities. If the rule were permitted to be extended it would tend directly to impair the selling value of all such property, and would operate to hinder improvements; and as it is the policy of the law that titles to real estate should become matters of certainty as far as possible, a person buying under such circumstances is presumptively a *bona fide* purchaser, and takes the title free from outstanding equities of which he had no notice."

This position is sustained by *Winkler v. Miller*, 54 Iowa, 476; *Snowden v. Tyler*, 21 Neb. 199; *Sherwood v. Moelle*, 36 Fed. R. 478.

In many of the cases deciding that a holder by a quitclaim deed can not be a *bona fide* purchaser, the words used limit the decision to cases where the quitclaim deed is given directly to the party claiming under it. *Johnson v. Williams*, 37 Kan. 179.

In this case it appears that two-thirds of the land was conveyed to the appellee's grantor by a guardian's deed, which was an effectual conveyance of the land, and the re-

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ceipt of which raised no presumption of any infirmity in the title. The quitclaim of the widow conveying the residue to the purchaser at the guardian's sale may fairly be presumed as a conveyance of the land itself, and not simply the vendor's chance of title, within the doctrine of *Garrett v. Christopher*, 74 Tex. 453.

The court did not err in its conclusions of law.

Judgment affirmed.

Filed Nov. 17, 1891.

No. 15,066.

BENSON, ADMINISTRATOR, v. CHRISTIAN.

JURISDICTION.—*Appellate Court.*—*Recovery of Money.*—*Public Officer.*—*Validity of Statute.*—Where a recovery of money only is sought, then no matter whether the action is against a public officer or an individual, or whether the action is in contract or tort, the jurisdiction is in the Appellate Court, unless the validity of a statute is involved.

SAME.—*Retention of for all Purposes.*—Where jurisdiction attaches for one purpose, it will be retained for all purposes. When a case which would otherwise go to the Appellate Court, goes to the Supreme Court, because the validity of a statute of the State is involved, the latter court will assume jurisdiction of the entire case.

OFFICE AND OFFICER.—*Illegal Fees.*—*Recovery of.*—The Legislature has the constitutional power to provide for the recovery of fees paid to an officer where they are exacted by an illegal taxation made by the officer.

SAME.—*Title of Act.*—*General Subject.*—*Particular Provision.*—The one subject covered by the title of the act approved February 28th, 1883 (Elliott's Supp., section 1969) is the fees and salaries of public officers, and a particular provision in said act relating to the recovery of fees, illegally taxed, is within the one general subject designated.

SAME.—*Public Officer.*—*Commingleing of Legal and Illegal Fees.*—*Right of Recovery.*—Where legal and illegal fees are so commingled by a public officer that no separation can be made, the plaintiff may recover all the fees exacted from him.

SAME.—*Recovery of Illegal Fees.*—*Complaint.*—*Sufficiency of.*—*Proof.*—In a

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suit against a public officer for the recovery of illegal fees charged by him, the complaint is sufficient if it shows that some of the charges were made since the act of 1883 went into effect, and that they are greater than the law allows. The plaintiff in such an action need only prove the amount exacted, and nothing more need be done by way of proof to make the illegality appear. The court will take notice of, and apply the law, and if the amount is greater than the law allows, adjudge that the amount demanded and exacted is illegal.

CONSTITUTIONAL LAW.—*Title of Acts of Legislature.* The title of an act need not go into details. It is sufficient if it indicates with reasonable precision and clearness the subject it embraces. Nor is an act invalid because it includes details not mentioned in the title, provided the details are germane to the general subject designated in the title.

BILL OF EXCEPTIONS.—*Evidence Properly in Record.*—If the evidence is properly in the bill of exceptions before the judge signs it, the fact that it was taken down by a stenographer, by counsel, or by any one else, is unimportant.

From the Hamilton Circuit Court.

R. R. Stephenson and W. R. Fertig, for appellant.

W. S. Christian, T. J. Kane and T. P. Davis, for appellee.

ELLIOTT, J.—This action was brought to recover money alleged to have been illegally exacted by the appellee as costs taxable in his favor as clerk of Hamilton county. The appellee succeeded upon the evidence.

The amount in controversy is much below the limit specified in the jurisdictional clause of the act creating the Appellate Court; and, if it were not for the fact that a question as to the constitutionality of a statute is made and argued, this court would not possess jurisdiction of this appeal. The fact that an action is against an officer does not change the rule, for where a recovery of money only is sought, then no matter whether the action is against a public officer or an individual, or whether the action is in contract or tort, the jurisdiction is in the Appellate Court, unless the validity of a statute is involved. *Ex parte Sweeney*, 126 Ind. 583, and cases cited.

The element which carries the appeal to this court is the one introduced by the attack upon the validity of the

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act, for where the question of the validity of a statute is fairly debatable, and does not rest on mere assertion, jurisdiction is in this court. *Ex parte Sweeney, supra.* This must be true, for if the Appellate Court could determine whether there was or was not a constitutional question involved, it would, in deciding that question, necessarily decide whether an appeal lies to the Supreme Court, and this would violate the fundamental rule that the higher court must determine its own jurisdiction; and it would also defeat the manifest purpose of the statute creating the Appellate Court. It is obvious that the court of last resort must determine the right of appeal; for if it were otherwise it would be in the power of a court of intermediate jurisdiction to prevent, by its decisions, a cause from reaching the court where the authoritative ultimate judgment must be pronounced. The authorities, however, so fully settle this question that prolonged discussion is unnecessary.

Where there is enough in the argument of counsel to fairly indicate that they sincerely believe that a constitutional question is involved, and also to supply fair reason for that belief, this court must assume jurisdiction, but there must be argument indicating such belief, and stating reasons for it, as bald assertions will go for nothing. Where there are arguments, and not mere assertions, the court must presume that counsel are sincere, and, presuming this, decide the question made by their argument in cases where the record presents it. Courts are bound to assume that counsel will not discredit their profession by insincere arguments or statements. Acting upon these presumptions and considerations, we shall decide the questions arising upon the contention that the statute providing for recovering fees illegally exacted is unconstitutional.

There is little force in the argument, tacitly rather than directly urged, that the Legislature has no constitutional power to provide for the recovery of fees paid to an officer

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where they are exacted by an illegal taxation made by the officer. It is true, that the common law rule is, that money paid under a mistake of law can not be recovered, but it does not follow that there is no power in the Legislature to provide for a recovery in such cases. Common law rules may be abrogated or changed by legislative enactment, unless the abrogation or change is interdicted by the letter or the spirit of the Constitution. There is nothing in our Constitution forbidding the Legislature from so changing the common law rule as to give a right of action against a public officer who illegally taxes and collects fees. The proposition is so clear that it requires no elaboration, but it may not be out of place to refer to the well-known rule that an officer takes his office *cum onere*, and if he is not content with the burdens or restrictions imposed by the Legislature he can resign.

The title of the act here in question is this: "An act supplemental to an act entitled 'An act fixing certain fees to be taxed in the offices and the salaries of officers therein named, providing for certain employees in certain public offices and fixing their compensation, defining certain duties and liabilities of officers and persons therein named, providing for the disposition of certain moneys, making certain appropriations declaring certain violations of the provisions of this act to be a penal offence, and prescribing the punishment and repealing all conflicting laws.'" Elliott's Supp., section 1969. The title may not be a model, but it is sufficiently clear and comprehensive to effectively include a provision giving a right of action for fees illegally collected by county officers. The title of an act need not, as it has been often decided, go into details. It is sufficient if it indicates with reasonable precision and clearness the subject it embraces. Nor is an act invalid because it includes details not mentioned in the title, provided the details are germane to the general subject designated in the title. Where a subject is properly designated and particular provisions germane to the subject

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named are embodied, the act is valid. The provisions of an act connected with the general subject and not foreign to it, or disconnected from the subject named in the title, may be properly embodied in the act although their embodiment carries the effect of the act to many particulars and details. *Hedderich v. State*, 101 Ind. 564; *Shoemaker v. Smith*, 37 Ind. 122; *Bitters v. Board, etc.*, 81 Ind. 125, and cases cited; *Crawfordsville, etc., Co. v. Fletcher*, 104 Ind. 97 (99); *Barnett v. Harshbarger*, 105 Ind. 410; *City of Indianapolis v. Huegele*, 115 Ind. 581.

The one subject covered by the title of the act before us is the fees and salaries of public officers, and a particular provision relating to the recovery of fees illegally taxed is within the one general subject designated.

It is a fundamental principle that where jurisdiction attaches for one purpose it will be retained for all purposes. *Ex parte Sweeney, supra*, and authorities cited. This principle is especially required in appellate procedure, for any other would lead to disastrous consequences. The court that investigates the case for one purpose necessarily investigates it for all in every instance where the investigation goes beyond the question of jurisdiction and reaches the merits, and it would be unwise and useless to require an examination of part of the one case by another tribunal. It would also be subversive of principle to have two distinct decisions in one case by separate courts. Upon the principles stated, and for the reasons suggested, we assume jurisdiction of the entire case.

The contention of the appellee's counsel that the evidence is not in the bill of exceptions can not prevail. The evidence, so far as the record discloses, was fully in the bill before it was signed. If the evidence is properly in the bill before the judge signs it, the fact that it was taken down by a stenographer, by counsel, or by any one else, is unimportant. As the bill contains the evidence in full it comes to us by authority and authentication of the judge. The decisions

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which assert that a stenographer's report can not be made part of the bill by reference, or by the clerk, by merely copying it, are not relevant to a case like this, where the evidence affirmatively appears to have been fully set forth before the judge attached his signature. All the bill contains is in it because it was put there by the judge. It would make no difference if the record did show that the stenographer took down the evidence, for what he took down was, as the record presents the matter to us, the evidence, and was by the judge put in the bill as the evidence before signing. It is a mistake, we may add, to suppose that the judge can not accept the evidence taken down by the stenographer. No matter who takes the evidence, if it is properly embodied in the bill of exceptions by the judge before he signs the bill, it is in the record on appeal, provided, of course, the bill is signed and filed in time. Counsel are in error in assuming that the bill professes to set out the long-hand manuscript of the stenographer. It makes no profession of the kind; on the contrary, it sets forth the evidence in full, as accepted by the judge, and is preceded by the proper preface and followed by the proper conclusion and signature. There is no reference, no "here insert;" all the evidence is professedly set forth at length. The bill on its face appears perfect and complete. If the transcript is not correct, the appellees ought to have had it corrected by *certiorari*, as they might have done upon timely application.

It is argued by appellee's counsel that the legal fees are so commingled with the illegal that there can be no action, and therefore no recovery can be had. But if the premise were true, the conclusion would not follow. It is an elementary rule that if a wrong-doer so commingles things that severance is impossible he must lose all. It would be flagrantly unjust to permit one who wrongfully blends legal and illegal fees so that no separation can be made, to reap the advantage of his own wrong. If loss must result from the wrong, the author of the wrong must bear

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it. If, therefore, the appellee's counsel are right in asserting that the illegal and the legal fees are so commingled that there can be no severance, the appellant must recover all the fees exacted from him.

The appellant's counsel point out a number of items which they allege are illegal, and support their statement by argument. We have compared the items with the statute, and it appears to us that some of the charges were made since the act of 1883 went into effect, and that they are greater than the act allows. There is, therefore, a right of recovery shown to some part, at least, of the amount claimed.

The case made by the complaint is within the provisions of the statute. Elliott's Supp., section 1976.

The appellee's counsel do not meet the statement of their opponents as the rules require; they simply assert that "The evidence supports the finding of the trial court, for the reason that there is no evidence showing that the costs taxed and received by the appellee were excessive and illegal, and that such costs were not voluntarily paid by appellants." This general statement gives us no such assistance as a court is entitled to receive, and as the rules require. It may be well to add that the general assertion appears to be founded upon a misconception of the law, for it implies that counsel affirm that, in addition to showing the amount received, something more must be done by way of proof to make the illegality appear. This assumption is erroneous. If parties prove the amount exacted, the court will take notice of and apply the law, and if the amount is greater than the law allows, adjudge that the amount demanded and exacted is illegal. Courts take notice of the law and its effect; only the facts require proof.

Judgment reversed, with instructions to award a new trial.

Filed Nov. 17, 1891.

Parker v. Dillingham et al.

129 542
138 176

No. 15,254.

PARKER v. DILLINGHAM ET AL.

STATUTE OF FRAUDS.—*Building Contracts.*—A verbal agreement by the owner of the property to pay the debt of the contractor to the material man, in a case where the owner owes the contractor nothing, is within the statute of frauds, and void, even where by reason of such verbal promise the material man furnished materials to complete the improvements, and forebore to file his lien within the allotted time.

SAME.—*Debt of Another.*—If, however, the owner was indebted to the contractor, his agreement to pay for the materials would in such case be an agreement to pay his own debt to a third person, and not within the statute.

SAME.—*Waiver of Mechanic's Lien.*—Mere forbearance to file a mechanic's lien is no consideration, but if an express agreement is made to waive the right of lien, such waiver constitutes a consideration which will render the owner's promise binding.

MECHANIC'S LIEN.—*Notice of Intention to File.*—Mere knowledge on the part of the owner of the property that the material man is furnishing the material is not sufficient. The material man must take such measures as will warn the owner that the initiatory steps are being taken to acquire a lien to the end that he may secure himself against a double payment for his improvements.

SAME.—*Instructions to Jury.—Evidence.*—Where there was no evidence tending to prove that the material man stood in a situation to acquire a lien, it was not error for the court to instruct the jury that they had nothing to do with the question as to whether the material man, on the faith of the promise of the owner to pay the debt, forebore to acquire a lien until it was too late to do so.

From the Marion Superior Court.

B. F. Witt and *L. B. Swift*, for appellant.

S. M. Shepard and *G. Martindale*, for appellees.

COFFEY, C. J.—This was an action by the appellees against the appellant, in the Marion Superior Court, to recover the value of certain materials used in the construction of buildings erected by the appellant in the city of Indianapolis. The complaint comprises four paragraphs. The first is a common count for materials sold and delivered. The second is upon an account stated. The third paragraph

is upon a verbal agreement to guarantee the payment for goods sold to one Hardee, and alleges part payment, which is relied upon to take the contract out of the statute of frauds. The fourth paragraph alleges, among other things, that in June, 1885, one Hardee, who had a contract with the appellant to build certain houses in the city of Indianapolis, on appellant's real estate, bought of the appellees the lumber and other material, an account of which is set out in the complaint, to be used, and which were used, in the construction of said houses; that he agreed to pay for the same out of the money to be paid him by the appellant for the building of said houses, which appellant knew; that appellees did not credit said Hardee, but intended to rely on the appellant, by taking a lien on the real estate upon which the houses were erected, and accordingly charged said lumber to the appellant; that when said houses were partially erected and before all said lumber and other material were delivered, Hardee failed, and the appellant himself undertook to complete the same; that he promised appellees that if they would furnish him the lumber and material necessary to complete said houses, and give him time, he would pay for all said lumber and material; that, relying on said promise, appellees released said Hardee from all claims, furnished the lumber and material, and gave the time requested, and thereby lost their right to take a lien on said real estate.

The appellees introduced evidence, on the trial of the cause, tending to prove that the appellant agreed with them, in consideration that they would give him a definite time, stipulated between them, that he would pay for the lumber and material furnished to Hardee and used in the construction of the buildings mentioned in the complaint, but there is no evidence in the record tending to prove that there was any agreement between the parties to the effect that the appellees should not take a material man's lien on the buildings for the material furnished and used by Hardee in the construction of the buildings erected by him for the appel-

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lant, nor is there any proof tending to show that the appellees had taken any of the steps necessary to secure a lien.

The court instructed the jury as follows:

"Seventh. The plaintiffs claim, and have introduced some evidence in support of such claim, that, relying on the alleged promise of the defendant to pay them, they forebore to acquire a lien on the houses built by Hardee until the time for taking one had expired. Whether this is so or not is a question with which, under the issues and evidence in this cause, you have nothing to do, and you will not consider it nor the evidence in relation to it."

The court also refused to give the jury, on behalf of the appellees, the following instructions:

"1. If you find from a preponderance of the evidence that the plaintiffs furnished the materials set forth in the bill of particulars filed with the complaint, to be used, and the same were used in constructing the houses of the defendant, and that plaintiffs might have taken a mechanic's lien upon the houses of the defendant for the same, and that plaintiffs intended to do so, and that before the time within which plaintiffs might have filed their mechanic's lien expired defendant promised to pay for such materials, if plaintiffs would give him a certain length of time, that plaintiffs did give him said time as requested, and that by so doing plaintiffs lost their right to take a lien upon defendant's houses, then you should find for the plaintiffs.

"2. If a person furnish to a contractor materials which are used to improve the property of another, and for which he may have a mechanic's lien on the property, and if, during the time within which he might give notice to the property-owner and perfect his lien upon the property, the owner verbally promises that he will pay for said materials, if said person furnishing the same will give him time, and if said person furnishing the materials gives said owner the time requested, and thereby loses his right to perfect a lien on

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the said property, said promise is binding on the said property-owner, and he is liable to pay for said materials."

The jury returned a verdict for the defendant, the appellant here, upon which the court, over a motion for a new trial, rendered judgment.

Upon appeal to the general term of the superior court, the judgment at special term was reversed on account of giving the instruction above set out, and on account of the refusal of the court to give the two instructions asked by the appellees, as above set forth. From the judgment of the general term reversing the judgment rendered at special term, this appeal is prosecuted.

Assuming that the agreement was made, as contended by the appellees, the appellant contends that such agreement is within the statute of frauds, and is not binding, while appellees contend that the agreement is not within the statute.

Section 4904, R. S. 1881, provides that no action shall be brought to charge any person, upon any special promise, to answer for the debt, default or miscarriage of another, unless the promise, contract or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized.

The instructions asked by the appellees assume that the debt in controversy was the debt of Hardee, and not the debt of the appellant.

In the adjudicated cases upon the question here presented all the authorities to which our attention has been called agree that there is a "distressing conflict" of opinion. But out of the numerous decisions relating to the construction of this statute, the rule has been firmly established that a promise to pay the debt of another is not within the statute, if its consideration was the abandonment of the provision of a security for the payment of the debt, consisting of a

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lien upon or interest in property, to which the promisor then had a subordinate title. A promise based upon such a consideration is held to be an original promise. *Crawford v. King*, 54 Ind. 6; *Spooner v. Dunn*, 7 Ind. 81; *Luark v. Malone*, 34 Ind. 444; *Bott v. Barr*, 95 Ind. 243.

It is claimed by the appellees that this case falls within that rule. It is to be observed, however, that the instructions asked by the appellees assume that there was an absence of any agreement to release or waive a lien, and are drawn upon the theory that the promise of the appellant to pay the debt of Hardee, in consideration of the extension of the time for its payment, followed by an omission to take a lien, was sufficient to take the case out of the statute. There was no agreement on the part of the appellees not to file a material man's lien, and the taking of such lien would not have been a violation of their agreement with the appellant, as his promise was made in consideration of the time given for the payment of the debt. Nor was there any agreement to release Hardee, or to extend the time of payment as to him. The appellant's liability under his agreement could not be increased by the omission of the appellees to do a thing not prohibited by the agreement, and for this reason we are unable to perceive how the failure to take a lien upon the appellant's property can have any effect upon the rights of the parties to this suit. We do not think the case falls within the rule above stated.

Stripped of all questions relating to the right of the appellees to take a lien upon the property of the appellant, the promise of the appellant is clearly within the statute. *Berkshire v. Young*, 45 Ind. 461.

If, then, the appellant is bound by the promise, assumed by the instructions to exist, it must be upon the ground that the appellees had a right to take a lien upon his property, and that it was for that reason, in a sense, his debt.

It is not a case where the owner of the building is indebted to the contractor and agrees to pay such debt to the mate-

rial man, for in that case he would only be agreeing to pay his own debt to a third party, but it is a case in which he is agreeing to pay the debt of the contractor to the material man, where he owes the contractor nothing.

Without deciding the question as to whether a promise of the kind under consideration would bind the owner of the building where it was shown that the material man stood in a situation to enforce a lien, it is sufficient to say that the evidence in this cause wholly fails to show that the appellees here stood in that situation.

By the provisions of section 1692, Elliott's Supplement, in force at the time the transaction here involved occurred, it was necessary that the appellees, before they could acquire a lien on the appellant's property, should notify him at or before the time they furnished the material, that they were furnishing the same. Mere knowledge on the part of the appellant that the appellees were furnishing the material was not sufficient. It was incumbent on them to take such measures as would warn the appellant that the initiatory steps were being taken to acquire a lien, to the end that he might secure himself against a double payment for his improvements. *Neeley v. Searight*, 113 Ind. 316; *Caylor v. Thorn*, 125 Ind. 201. This, so far as the evidence in the cause shows, the appellees wholly failed to do. For this reason the instructions asked by the appellees were not applicable to the case made by the evidence in the cause, and the court for that reason, if for no other, we think, properly refused them.

As there was no evidence in the cause tending to prove that the appellees stood in a situation to acquire a lien on the property of the appellant, it was not error for the court to say to the jury that they had nothing to do with the question as to whether appellees, on the faith of the promise of the appellant to pay the debt, forebore to acquire a lien until it was too late to do so. No such question was presented, by the evidence, for their consideration.

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In our opinion the superior court, in general term, erred in reversing the judgment at special term, upon the grounds above stated.

Judgment reversed, with directions to proceed in accordance with this opinion.

Filed Nov. 17, 1891.

No. 15,159.

BALES v. PIDGEON.

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EASEMENT.—Prescription.—Use for More than Twenty Years.—Where, by agreement, a right of way is established by mistake over the land of another, and its use is continued for more than twenty years, a title is acquired which is appurtenant to and passes with the land.

SAME.—Effect of Subsequent Survey.—No survey after twenty years can change the rights of the parties, or entitle the one over whose land such right of way has been established to interfere with its free use.

From the Henry Circuit Court.

J. M. Brown, for appellant.

J. M. Morris, for appellee.

OLDS, J.—The contest in this case is over a right of way from the land of the appellee to a public highway. The facts, as found by the court, are substantially, as follows: Mary Pidgeon owns forty-five acres of land. Immediately on the south of it is a tract owned by Solomon Bales, appellant. There is a public highway, known as the Franklin and Circleville turnpike, running through the tract owned by said appellant, Bales. In 1839, George Nicholson owned the land now owned by said Bales, and David Pidgeon owned the eighty acres lying immediately on the west of the tracts now owned by the appellant, and also owned the tract now owned by said appellee, Mary Pidgeon. The said Nicholson and David Pidgeon, being desirous of ascertaining the line

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running north and south, and dividing their two tracts, the one now owned by Bales and the eighty lying west of it, took a rod pole and measured the same, and ascertained where, in their judgment, the true line was situated. It was then agreed that said David Pidgeon was to have a road leading from the Franklin and Circleville turnpike to the tract of land then owned by David Pidgeon, on the north of the said Nicholson tract, a part of which is now owned by said appellee, and on which she now resides, and has improvements. The road was thus located all upon the land of said David Pidgeon, according to the line thus ascertained and agreed upon, and the fence of said Nicholson was built on the east line of said road, or right of way, it being agreed that that was his west line; that ever since said date said road has been opened and used continuously as an exit from the land of Mary Pidgeon to the Franklin and Circleville turnpike to a width of sixteen feet, and fenced on both sides, open at the end, and it has been continuously used by the appellee, her grantors, and the public generally, and his and her grantors have had the exclusive, open, and undisputed possession, enjoyment, and use of said road, so opened, to pass to and from the real estate, and buildings thereon so owned by the appellee. The land owned by Nicholson has, by mesne conveyances, been transferred to and is now owned by the appellant; that in 1887 there was a survey made to ascertain the line between said tracts of land aforesaid. According to such survey of the line between the said tracts of land so owned by the said David Pidgeon on the west of said tract owned by appellant, Bales, and the said tract so owned by Bales, the west line of the tract owned by Bales was ten or twelve feet west of the old line agreed upon between Nicholson and Pidgeon, and which had been acquiesced in as the true line from 1839 to the survey in 1887; that after the survey said Bales moved his fences and obstructed said roadway, so long used and occupied as aforesaid, by moving his

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fence over eleven or twelve feet, and by fencing the ends, and putting up gates.

The appellee brought this action to establish her right to the road, and the court found in her favor.

The facts found do not show that this roadway was occupied under a license from the appellant or his grantors, or any of them. It shows that the owners of the two tracts, in 1839, measured the land and agreed as to the location of the division line, and the road was located upon the land of Pidgeon, and was fenced and used by David Pidgeon and his grantees, and the successive owners of the land, as a way to and from the land now owned by said appellee; they using and occupying the same as owners of the land, not acknowledging or having any knowledge that the appellant or his grantors had any interest in or right to the land so used as a roadway and passage for the owner and occupants of the land and the general public to and from the land. This occupancy continued for nearly fifty years. They had acquired an interest and right to use the land, which became and was appurtenant to the land and passed with the land. *Parish v. Kaspere*, 109 Ind. 586; *Bowen v. Swander*, 121 Ind. 164.

The subsequent survey of the land gave to the appellant no right to the land. *Riggs v. Riley*, 113 Ind. 208. The title to the land had before that time been fixed by the use and occupancy as of right for more than twenty years, and no survey could change the rights of the parties. The occupancy and use in this case was not an occupancy and use of a private way over the land of appellant and his grantor, but the occupancy commenced by David Pidgeon throwing open a way over his own land to another tract owned by him, and as the land with which the road connected was transferred, it continued to be occupied as of right, and as belonging to the eighty-acre tract on the west of the appellant, and his right to interfere with such roadway has long since ceased. If it had been originally established and used as a right of way over the appellant's or his grantor's land under a license,

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and the appellee was only attempting to interfere with it by placing gates at the end, it would present a different question.

From the finding of facts, it appears this road was agreed upon between the owners of the two tracts at the time of the measurement to ascertain the division line. It appears from the finding of facts to have been a part of the same transaction, and that, Pidgeon being desirous of a roadway, the measurement was made, and it was agreed that the road was to be all located on the land of Pidgeon. The measurement was made and the road located on the land of Pidgeon, and fences were built in accordance with such measurement and agreement of the parties, and it was ever afterwards occupied as a part of the Pidgeon tract, and his conveyances were made with reference to it, and his grantees, the successive owners, continued to occupy the same and have the free and undisputed use of it. *Robinson v. Thrailkill*, 110 Ind. 117.

There is no error in the record:

Judgment affirmed, with costs.

Filed Nov. 20, 1891.

No. 16,322.

LEFFORGE v. THE STATE.

CRIMINAL LAW.—*Incest.—Evidence of Acts Prior to Specific Act Charged.*—In a prosecution for incest, it is competent for the State to prove acts of sexual intercourse prior to the specific act charged in the indictment. *SAME.—Excessive Sentence.*—A sentence to imprisonment for eight years of one convicted of the crime of incest, after the passage of the act of March 7th, 1891, limiting the maximum term of imprisonment to five years, is void.

From the Decatur Circuit Court.

J. S. Scobey, for appellant.

A. G. Smith, Attorney General, for the State.

The City of Wabash v. Carver.

ELLIOTT, J.—The appellant was convicted of the crime of incest, and sentenced to imprisonment in the State prison for a term of eight years.

One of the grounds upon which appellant's counsel asks a reversal is that the court erred in permitting the State to prove acts of sexual intercourse prior to the specific act charged in the indictment. There was no error in this ruling. The decisions establish the doctrine that it is competent to prove previous acts of familiarity between the parties, although they culminate in the act of carnal intercourse. *State v. Markins*, 95 Ind. 464; *Ramey v. State, ex rel*, 127 Ind. 243; *Thayer v. Thayer*, 101 Mass. 111; *State v. Bridgman*, 49 Vt. 202 (24 Am. Rep. 124) and cases cited; *State v. Pippin*, 88 N. C. 646; *State v. Kemp*, 87 N. C. 538; Bishop's Statutory Crimes, section 680.

The appellant was tried and convicted on the 21st day of September, 1891, and on that day the act of March 7, 1891, was in force. (Acts of 1891, page 347.) That act amends the prior act, and limits the maximum punishment by imprisonment to a term of five years. There was, therefore, no law in force at the time of the trial authorizing the jury to sentence the accused to imprisonment for the period of eight years, and the sentence is wholly unauthorized.

Judgment reversed, with instructions to award a new trial.

Filed Nov. 19, 1891.

No. 14,554.

THE CITY OF WABASH v. CARVER.

NEGLIGENCE.—Contributory.—Crossing Bridge with Traction-Engine.—In an action by an administrator for the death of his decedent, caused by a defective bridge, a general averment that such decedent was without fault is not overcome by specific averments showing that he attempted to cross the said bridge with a traction steam-engine, with water-tank and threshing machine attached.

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| 141 | 506 |

The City of Wabash v. Carver.

BRIDGE.—*Duty of City to Repair.*—The act of March 7th, 1885 (Acts 1885, p. 74), which makes it the duty of boards of county commissioners to build all bridges within the corporate limits of any city or town within the State, the estimated cost of which exceeds five hundred dollars, does not purport to in any other manner interfere with the absolute control of the city over the bridges, nor does it relieve cities from the duty of keeping them in repair.

DAMAGES.—*Excessive.*—In a suit by an administrator for the wrongful death of his decedent, where the evidence shows that such decedent was a widower, with no children dependent upon him, aged seventy-three, strong and vigorous, and actively engaged in business, a verdict for one thousand dollars damages will not be disturbed as excessive.

From the Wabash Circuit Court.

A. Taylor, for appellant.

C. E. Cowgill, H. B. Shiveley and H. C. Pettit, for appellee.

McBRIDE, J.—This was a suit by the appellee, as administrator of Joseph Carver, deceased, to recover damages for his death, which was caused, it is alleged, by the actionable negligence of the appellant.

The complaint charges that a certain bridge within the corporate limits of the city, "over what is known as the Wabash and Erie Canal, where Miami street in said city crosses said canal, the said street being a public highway and street of said city, and said bridge forming a part of said street and highway, and being in almost constant and incessant use by the travelling public of said city and surrounding county in crossing said canal where the same has been erected, was suffered by said city to become and remain greatly out of repair, and in a state of decay and insufficiency for the purposes and uses for which it was erected, and dangerous for all who should pass over the same, the stringers, beams and timbers under and supporting the floor of said bridge becoming entirely rotten, of which rotten and unsafe condition the officers of said city were informed and well knew, and by reason thereof, unfit and unsafe to be travelled over; the same being allowed and suffered to get

The City of Wabash v. Carver.

into such unsafe, dangerous and rotten condition by said city and its officers, by the defendant's carelessness, negligence and the utter disregard of the safety of those who had a right to pass over the same; * * * that on said 8th day of August, 1887, the said Joseph Carver, now deceased, the personal representative of whom is this plaintiff, being then in good health, and without any knowledge of the unsafe and dangerous condition of said bridge, or that the timbers supporting the floor thereof were rotten, and without any fault, want of care, or negligence on his part whatever, and believing it was entirely safe to so do, and as he had a right to do, attempted to pass over said bridge, from the north side of said canal to the south side thereof, along said street, with what is known as a traction steam-engine and water-tank, and threshing machine attached thereto. And plaintiff avers that when said engine passed onto said bridge, the same being at the time conducted, guided and managed in a prudent and careful manner, the said deceased then sitting on a seat provided and used for the purpose was engaged in guiding and steering said engine, the timbers beneath the floor of said bridge, and supporting the same, because of their neglected, decayed and rotten condition, broke and gave way, and precipitated said engine into said canal, catching and crushing said Joseph Carver between said engine and the water-tank attached thereto, causing and producing his instant death," etc.

The complaint is in two paragraphs, which are substantially alike, except that one paragraph charges actual knowledge by the officers of the city of the defective condition of the bridge, and the other avers facts sufficient to charge them with notice, but does not charge actual notice.

The circuit court overruled demurrers to each paragraph. In this the appellant insists the court erred.

The specific defect, which the appellant contends makes the complaint bad, is, that, notwithstanding the averments that the decedent was without fault, the specific averments are

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sufficient to overcome this, and show that he was guilty of contributory negligence.

A reference to the complaint above quoted will show that the averments of freedom from fault on the part of the decedent are much more full than are usual, and more full than required by the precedents in this State.

In the case of *Ohio, etc., R. W. Co. v. Walker*, 113 Ind. 196 (1898), the court said: "It has long been the rule in this State that the general averment that the plaintiff was without fault is sufficient, unless the facts specially pleaded clearly show that he was guilty of contributory negligence." The writer of the opinion cites many authorities abundantly sustaining the rule thus stated, and in addition very clearly vindicates its soundness on principle.

The specific averments which it is insisted control the general averments negating contributory negligence, are those showing that the decedent attempted to cross the bridge with a traction steam-engine, with water-tank and threshing machine attached. To sustain the appellee in this contention we would be obliged to hold that to attempt to cross a bridge on a public highway, which is in constant use, with a traction steam-engine, water-tank and threshing machine, is in itself negligence *per se*.

In the case of *Wabash, etc., R. W. Co. v. Farver*, 111 Ind. 195, it is stated as a fact, of which the court takes judicial notice, that such engines have become familiar in every agricultural community, that they are customarily moved from place to place over the public highways, and that such use of the highways has become so common that it must be supposed that horses of ordinary gentleness have become so familiar with them as to be safe under ordinary guidance. Whether this assumption of judicial knowledge is fully justified or not need not be here considered. But it certainly can not be true that an averment showing that the decedent was using the bridge in a manner that had become usual and common necessarily carries with it an inference of contrib-

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utory negligence so strong that it overcomes all of the usual averments that he was free from fault. No other objection is made to the complaint, and we think it is clearly good.

The appellant filed an answer in three paragraphs, the third paragraph of which avers that the bridge was one the construction of which cost over \$500.

To this paragraph the court sustained a demurrer. This answer proceeds on the theory that because the statute (Elliott's Supp., section 1521—Acts of 1885, p. 74) makes it the duty of boards of county commissioners to build all bridges within the corporate limits of any city or town within the State, the estimated cost of which exceeds \$500, this inferentially relieves cities and towns of the duty of keeping such bridges in repair. The answer is plainly bad. Cities and towns are by statute (sections 3161 and 3367, R. S. 1881) given exclusive power and control over the streets, alleys, highways and bridges within their respective limits. It was said by this court in the case of *City of Goshen v. Myers*, 119 Ind. 196, that "It was evidently the intention of the Legislature by the passage of this statute to leave all public bridges, within the limits of the cities in the State, of which they may take control, under the absolute management of the common council of such cities, and to charge them with the duty of keeping such bridges in repair."

The act of March 7th, 1885, which includes section 1521, Elliott's Supplement above referred to, while it imposes the duty of construction upon the board of county commissioners in certain cases, does not purport to in any other manner interfere with the absolute control of the city over the bridges, nor does it relieve cities from the duty of keeping them in repair. In our opinion that duty still rests upon them.

Complaint is also made that the damages assessed are excessive, and that the court erred in instructing the jury as to the measure of damages. There is some confusion in the record over the instructions given and refused, and, after the

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appellant's original brief was filed, a writ of *certiorari* was awarded for the correction of the record.

The corrections and changes in the record made by the return to this writ removed much that previously appeared objectionable. We deem it unnecessary to encumber the record by bringing into this opinion the instructions given and refused. A careful examination of all of them leads us to the opinion that the jury were sufficiently and correctly instructed as to the measure of damages, and that the appellant was not harmed by the refusal of the court to give any instruction asked by it. Indeed, as we understand appellant's counsel, the objection now is not so much that the court erred in giving and refusing instructions as that the jury erred in assessing damages.

The decedent was about seventy-three years old, a widower, and his children were all of mature years and none of them dependent upon him. The jury awarded \$1,000 damages. This the appellant insists was so excessive that the verdict should be set aside.

The evidence showed that the decedent, notwithstanding his years, was strong and vigorous for his age, and actively engaged in business.

In cases of this character, as said by Judge DAVIS, in the case of *Barron v. Illinois Central R. R. Co.*, 1 Bissell, 453: "There is no fixed measure of damages, and no artificial rule by which the damages in a given case can be computed."

The jury are necessarily given a somewhat wide range of discretion. We can not say that that discretion has been abused in this case, and that the damages awarded were excessive.

Judgment affirmed.

Filed Nov. 17, 1891.

Van Sickle v. Belknap.

No. 15,146.

VAN SICKLE v. BELKNAP.

RIGHTS AND REMEDIES.—Where a statute creates a right, and provides generally for its enforcement, but neither creates nor designates a remedy, the implication is that the Legislature intended that the right should be enforced by some existing and appropriate remedy.

STREET IMPROVEMENT.—*Lien for.*—*Enforcement of.*—*Pleading.*—In a suit by a contractor under the act of April 13th, 1885, to enforce a lien for street improvement on the abutting lots, he must plead all the acts done by the municipal officers, and all facts essential to show their authority, but he is not bound to incorporate in his complaint, by reference or otherwise, any written instrument except the estimate or assessment.

PRACTICE.—*Instructions to Jury.*—*Making Part of Record.*—*Bill of Exceptions.*—Instructions which are not brought into the record by a bill of exceptions, or which are not signed by the judge and filed as a part of the record, can not be considered on appeal.

From the Clinton Circuit Court.

F. F. Moore, for appellant.

J. C. Farber, for appellee.

ELLIOTT, J.—The appellee asserts a right to enforce a lien for an assessment levied for the expense of improving a street running through unplatted grounds in the city of Frankfort. The suit is governed by the act of April 13th, 1885, Elliott's Supp., section 753. *Crowell v. Jaqua*, 114 Ind. 246. The act provides, in general terms, that such a lien may be enforced by the contractor, in the Circuit Court of the county in which the city directing the improvement is situated.

Where a statute creates a right, and provides generally for its enforcement, but neither creates nor designates a remedy, the implication is that the Legislature intended that the right should be enforced by some existing and appropriate remedy. *Fitch v. Creighton*, 24 How. 159; *Reynolds v. Crawfordsville Bank*, 112 U. S. 405. As the appellee seeks a specific relief by the enforcement of a statutory

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lien, he must aver such facts as bring his case within the statute creating the lien. The nature of the relief sought gives his case an equitable character, rather than a legal one, for the foreclosure of liens upon real property is the exercise of equity power. *Albrecht v. C. C. Foster Lumber Co.*, 126 Ind. 318, and cases cited; *Ex parte Sweeney*, 126 Ind. 583 (591). Under the rules just stated, the appellee's complaint must be held good, if it states such facts as entitles him to the equitable relief he seeks; if it does not state such facts, it must be deemed bad. If it shows such facts as create a lien, then the right to the equitable relief is established, since, if a lien exists, he is entitled to a decree foreclosing it.

The complaint contains these averments: That the common council of the city of Frankfort, by a unanimous vote, enacted an ordinance for the improvement of Jackson street, and providing for the assessment of abutting lots; that notice inviting proposals was published for four consecutive weeks; that divers bids were submitted to the common council; that the plaintiff's bid was the lowest and best; that the plaintiff's bid was accepted, and the contract awarded him; that on the 4th day of August, 1887, the plaintiff contracted in writing for the performance of the work, and executed a bond to secure the performance of his contract; that the contract and bond were accepted by the common council, and the mayor authorized to sign the contract for the city; that the contract provided for the collection of the expense of the improvement, except for street and alley crossings, from the owners of lots; that the plaintiff fully completed the work according to his contract; that the work was accepted by the city civil engineer, and by the city; that the engineer was ordered to deliver to the plaintiff an estimate, and that he did deliver an estimate to the plaintiff on the 17th day of January, 1888; that the common council approved the estimate on the 19th day of the same month, and directed payment of the sums charged against the respective

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lots; that there was assessed against unplatted land owned by the appellant the sum of one hundred and fifty-four dollars, of which sum the plaintiff demanded payment, but payment was refused, and the sum remains unpaid, except ninety dollars paid by the appellant; that more than sixty days have elapsed since the completion of the work and the demand for payment. The estimate issued to the plaintiff is incorporated into the complaint by reference, and duly made an exhibit. The lot owned by the appellant is fully described.

It is our judgment that the complaint states facts entitling the appellee to a lien. It shows compliance with all of the material statutory requirements, and this is sufficient. It is never proper to plead evidence, for only facts are to be averred. The proceedings of the municipal authorities, as shown by the proceedings of record, are evidence, but such proceedings need not be pleaded at length. It is only necessary to plead the acts done by the municipal officers, and to aver generally the facts showing that they were rightfully done. It is not necessary to go into minute detail, nor to make exhibits of all the ordinances, orders or the like, entered of record. This may be necessary where expressly made so by statute, as in the case of an appeal from an assessment under section 3165, but it is not so where the suit is brought and conducted under ordinary rules of procedure. It would subserve no useful purpose to overload a complaint with exhibits; on the contrary, it would needlessly burden the record, create confusion, and uselessly increase the expense of litigation.

The specific objection urged against the complaint is that the written contract between the municipal corporation and the appellee is not made part of the pleading. It is assumed, as the basis of the argument upon this question, that the contract is the foundation of the lien. But this assumption can not be sustained. The ordinance, the advertisement, and the award are as essential as the contract, but no one of them in

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itself can be said to be the foundation of the lien. The truth is that these things constitute steps in the procedure, but no one of them constitutes the foundation of the lien, for all must exist to create a perfect lien, and, where there is no element of waiver or estoppel, all must be shown in order to establish an enforceable right.

In a narrow sense, the estimate issued by the engineer and adopted by the common council constitutes the lien, and the steps preceding the final action upon the estimate are necessary to give the estimate validity and force. *Langsdale v. Nicklaus*, 38 Ind. 289; *Jones v. Schulmeyer*, 39 Ind. 119; *City of Indianapolis v. Imberry*, 17 Ind. 175.

It is generally held that the estimate of an officer, such as a civil engineer of a city, is *prima facie* correct, and is to be sustained unless successfully impeached. See authorities cited in notes, p. 430, Elliott Roads and Streets. It is, therefore, with reason that it is held in analogous cases that a copy of the assessment or estimate should be incorporated in the complaint. But it is held in those cases that it is not necessary to set forth other instruments, nor to plead them at length. *Smith v. Clifford*, 99 Ind. 113; *State, ex rel., v. Myers*, 100 Ind. 487; *Albertson v. State, ex rel.*, 95 Ind. 370; *Laverty v. State*, 109 Ind. 217; *Neiman v. State, ex rel.*, 98 Ind. 58.

We can perceive no reason why the rule declared in the cases cited should not govern such a case as this, for the cases are all of the same general class. Our conclusion is that a plaintiff must plead all the acts done by the municipal officers, and all such facts as are essential to show authority to perform the acts, but that he is not bound to incorporate in his complaint, by reference or otherwise, any written instrument, except the estimate or assessment.

We can not do otherwise than sustain the appellee's contention that the instructions given at their request are not in the record, for they are not made part of it by any method

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known to the law. There is no bill of exceptions; there is no signature to what the appellant denominates the instructions; there is no special order making the appellee's instructions part of the record, nor is there any authentic statement that they were filed. Many decisions support the appellee's position. *Olds v. Deckman*, 98 Ind. 163; *O'Donald v. Constant*, 82 Ind. 212; *Heaton v. White*, 85 Ind. 376; *Landwerlen v. Wheeler*, 106 Ind. 523; *Supreme Lodge, etc., v. Johnson*, 78 Ind. 110; *Butler v. Roberts*, 118 Ind. 481; *Fort Wayne, etc., R. R. Co. v. Beyerle*, 110 Ind. 100.

Judgment affirmed.

Filed Sept. 19, 1891; petition for a rehearing overruled Nov. 20, 1891.

No. 15,330.

THE BOARD OF COMMISSIONERS OF GIBSON COUNTY v.
TICHENOR.

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PRACTICE.—*Appeal to Supreme Court.—Sufficiency of Complaint, How Tested.*

—Where the sufficiency of a complaint is questioned for the first time by an assignment of error in the Supreme Court, such assignment must be predicated upon the complaint as an entirety, and not upon the separate paragraphs thereof.

COUNTY COMMISSIONERS.—*Action Against.*—A suit can not be maintained against a board of county commissioners until it has been given an opportunity to act.

SAME.—*Refusal to Act.—Right of Action Against.*—While no action will lie against the board of county commissioners until an opportunity is given it to act, still, after a refusal to act an action may be maintained against it.

SAME.—*County Treasurer.—Suit by to Recover for Erroneous Payments.—Section 6510, R. S. 1881, Construed.*—Section 6510 relates to county revenue only. In an action against a board of commissioners to collect money erroneously paid into the county treasury it was held error to render judgment against the county for any other funds except such as went into the county treasury as county revenue. The county can not be held liable for money erroneously paid in for the use of the State, township or corporations.

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JURISDICTION.—*Circuit Court.*—*Complaint Need not Show.*—As the circuit court is a court of general jurisdiction, its authority to proceed in a cause need not affirmatively appear by the complaint.

From the Gibson Circuit Court.

A. P. Twineham and W. D. Robinson, for appellant.

S. H. Kidd and J. W. De Priest, for appellee.

COFFEY, C. J.—Section 5811, R. S. 1881, which went into force on the 31st day of March, 1879, among other things, provides that when it shall be made to appear, to the satisfaction of the board of commissioners of any county of this State, that, by reason of any erroneous charges on the tax duplicate, or through inadvertence, mistake or any other cause, any county, township or school officer has paid over to such commissioners more money than was justly or equitably due or owing from such officer, such board is authorized to order the repayment of such money, out of the proper funds, in their proportion, and credit to be given by the auditor therefor.

Sections 6510 and 6511, R. S. 1881, are as follows: "6510. Whenever it shall appear to the board doing county business in any of the counties of this State, by clear and sufficient proof, that, by reason of erroneous charges in the tax duplicate, or from any other cause, the treasurer of such county has paid and accounted to such board for more money than was justly due from him on account of county revenue, said board doing county business shall direct the auditor to credit said treasurer with the sum or sums thus improperly paid, and order the same to be refunded from the county treasury. 6511. Whenever similar improper or erroneous payments have been made by any county treasurer to the State treasurer, the board doing county business shall direct the auditor to certify said improper or erroneous payments to the auditor of State, under his seal of office, who shall audit and allow the same as a claim against the State treasurer, and said treasurer shall pay the same out of any moneys

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not otherwise appropriated." These sections went into force on the 29th day of March, 1881.

Under these several statutory provisions the appellee, who was the treasurer of Gibson county from the 8th day of September, 1883, to the 7th day of September, 1887, instituted this suit, in the Gibson Circuit Court, alleging in his complaint that during his term of office he paid over, through mistake and inadvertence, and on account of erroneous charges on the tax duplicate, the sum of \$1,441.35 of his individual funds to which the county was not entitled.

The cause was tried by the court, which, at the request of the parties, made a special finding of the facts, and stated its conclusions of law thereon. It appears from the special finding of facts, among other things, that the appellee, during his term of office erroneously paid out \$1,441.35 more than was justly due from him. This sum included the following funds: State fund, \$327.65; county tax, \$343.77; interest on court-house bonds, \$59.09; special road tax, \$80.57; road tax, \$96.68; township tax, \$98.48; township tuition, \$163.83; special school tax, \$189.79; corporation tax, \$42.08; library tax, \$6.27; school-house bond tax, \$33.12.

The court stated as its conclusions of law :

First. That as to the money paid to the State treasurer the appellee was not entitled to recover in this action.

Second. That as to the balance of the money so erroneously paid by the appellee, he was entitled to recover the same from Gibson county,—and rendered judgment accordingly.

The errors assigned are :

"First. That neither paragraph of the complaint states facts sufficient to constitute a cause of action.

"Second. That the court had no jurisdiction of the subject-matter of the action.

"Third. That the court erred in its second conclusion of law upon the facts specially found."

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The appellee assigns as cross-error that the court erred in its first conclusion of law upon the facts found.

The first assignment of error presents no question for our consideration.

Where the sufficiency of a complaint is questioned for the first time by an assignment of error in this court, it is settled that such assignment must be predicated upon the complaint as an entirety, and not upon the separate paragraphs thereof. *Ludlow v. Ludlow*, 109 Ind. 199; *Louisville, etc., R. W. Co. v. Peck*, 99 Ind. 68.

It does not affirmatively appear by the complaint in this cause that the court did not have jurisdiction of the subject-matter of this action. Assuming, as contended by the appellant, that no action would lie against the board of commissioners until an opportunity had been afforded it to act, still, after a refusal to act, we think an action might be maintained against it. As the circuit court is a court of general jurisdiction, its authority to proceed in a cause need not affirmatively appear by the complaint. *Chapell v. Shuee*, 117 Ind. 481; *Bass Foundry, etc., Works v. Board, etc.*, 115 Ind. 234.

The third assignment of error calls in question the construction of the several statutory provisions above set out. It is contended by the appellant that no action will lie against the board of commissioners under these statutes until such board has had an opportunity to pass upon the rights of the complaining party and to correct the mistake, if one is found to exist. That such was the intention of the Legislature would seem to be perfectly plain. Section 6510 clearly contemplates a trial before the board of commissioners, for it is therein expressly provided that the order to repay the money erroneously paid shall be refunded only upon "clear and sufficient proof."

As the order to refund is to be made by that body, the proof, of course, is to be made before it, in order that it may determine the propriety of making the order.

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Of course, we do not mean to be understood as holding that, when clear and sufficient proof is made, the board may refuse to make the order and thus end the claim; for these statutes, we think, confer upon the party making such erroneous payment a legal demand against the county; and, where the board wrongfully refuses to allow such claim, a right of action exists to recover it. But the statute does contemplate that the board of commissioners shall have an opportunity to pass upon the demand, and unless this statute is modified by some other statutory provision, this action can not be maintained, provided it appears in the record before us that no such opportunity was afforded. We know of no statute modifying the one under consideration in the matter suggested; indeed, it is held by this court that the circuit court, under existing statutes, does not possess jurisdiction to try and determine claims against the several counties of the State until the boards of commissioners have had an opportunity to pass upon such claims. But it is further held that the facts conferring such jurisdiction need not be alleged in the complaint. *Bass Foundry, etc., Works v. Board, etc., supra.*

It does not appear by the record before us whether this claim was, or was not, presented to the board of commissioners of Gibson county before the commencement of this suit. If it was not so presented, that was a matter of defence, which was not interposed in this case. As it was not necessary to allege the jurisdictional facts in the complaint, it was not necessary to the appellee's recovery that the court should make any finding upon that subject.

Finally, it is contended by the appellant that the court erred in rendering judgment against the county for the funds which did not go into the county treasury as county revenue. This contention, we think, must be sustained. Section 6510 relates to county revenue only. We think it was the intention of the Legislature that the county should not profit by the mistakes of its officers, by which it received into its

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treasury money to which it was not entitled; but there is nothing in the act from which it can be inferred that it was the legislative intent that the county should reimburse the treasurer for money paid to the State, or to the townships, or to corporations. In such funds the county has no interest, and to require it to reimburse the treasurer for such funds would render it necessary to tax the people of the county generally, on account of funds used in some particular township or municipal corporation for purely local purposes. This would be unjust, and to justify us in holding that the Legislature intended such an injustice the language of the statute should be such as to leave no reasonable doubt.

The court erred in including in its judgment money paid over to the township trustees in various townships in Gibson county.

The court did not err in its first conclusion of law. Section 6511 expressly provides that the treasurer shall be reimbursed out of the State treasury, and not out of the county treasury.

It is true it devolves upon the board of commissioners to make the proper finding and order, but this is not a proceeding seeking a finding and order of the kind required, but is an action to recover a money judgment. The law does not contemplate a money judgment against the county for money erroneously paid into the State treasury.

Judgment reversed, with directions to render judgment on the special finding of facts in favor of the appellee for the amount of county revenue erroneously paid into the county treasury, and for no more.

Filed Nov. 19, 1891.

Barnes v. Mowry.

No. 15,147.

BARNES v. MOWRY.

PLEADING.—Complaint.—Exhibits.—It is only proper to make an instrument an exhibit when it is the foundation of an action. Any other exhibit will be disregarded.

PRINCIPAL AND SURETY.—Creditor's Inaction.—When Surety not Released.—A creditor does not lose his right to hold the surety by inaction or passiveness except in cases where the surety has taken such steps as compel the creditor to proceed or lose his claim.

SAME.—Release of Surety.—Notice to Creditor to Proceed.—A surety is not released by the failure of the creditor to proceed against the principal until the surety has complied with the statutory provision by notifying the creditor to proceed against the principal. The surety can only obtain his release by following the provisions of the statute in his behalf.

SAME.—Institution of Suit.—Notice.—A suit, no matter what its character, can not operate as a notice so as to release a surety.

From the Decatur Circuit Court.

J. S. Scobey, for appellant.

W. A. Moore, for appellee.

ELLIOTT, J.—The appellee's complaint counts upon a promissory note executed by the appellant and William Sammons. Default was suffered by Sammons, and an answer and a cross-complaint were filed by the appellant, but they were held bad on demurrer.

The pleadings of the appellant make exhibits of copies of the record in a former action between the same parties, but as the record is not the foundation of either of the pleadings the exhibits can not be considered. It has been decided time and time again that it is bad pleading to overload a record with exhibits, and that it is only proper to make an instrument an exhibit when it is the foundation of the cause of action or of the defence. The cases are too numerous for citation, and the rule too firmly settled to excuse, much less require, discussion. The exhibits must be, and they are, wholly disregarded.

Laying out of consideration, as we must do, the exhibits,

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the allegations of the answer are, in substance, these: That the defendant is the accommodation surety of Sammons; that the plaintiff has at all times known that fact; that, on the 15th day of February, 1889, the defendant instituted an action against Mowry, Sammons and others; that summons was therein issued and served; that Sammons and Mowry appeared; that during the February term of the court in which the action was pending the plaintiff had ample time to take judgment on the note in suit; that he did not at that term, nor at the April term, 1889, institute any action, but delayed until the September term of that year; that during the pendency of the action brought by the defendant the plaintiff knew that Mowry was solvent; that, confederating with Sammons to prevent and delay the defendant from securing himself from liability, as surety, the plaintiff refused to take steps to enforce the collection of the note.

This answer is plainly bad. A creditor does not lose his right to hold the surety by inaction or passiveness except in cases where the surety has taken such steps as compel the creditor to proceed or lose his claim. *Philbrooks v. McEwen*, 29 Ind. 347; *Vance v. English*, 78 Ind. 80; *Gipson v. Ogden*, 100 Ind. 20 (21); *Second Nat'l Bank v. Hill*, 76 Ind. 223 (229); *Mayor, etc., v. Stout*, 52 N. J. L. 35; *Brown v. Hlanders*, 80 Ga. 209.

It is no doubt true that the wrongful failure of a creditor to sue where he is required to bring suit in the mode prescribed by law will release the surety, but to have this effect the surety must do what the law directs. He can not disregard the law and choose his own mode of procedure. If he selects a mode of procedure of his own he has no one to blame but himself if he finds that his effort has not borne fruit. Our statute offers the creditor a simple, plain and efficacious remedy, and if he does not pursue it he can not successfully complain. As said in *Franklin v. Franklin*, 71 Ind. 573, "As this remedy is purely statutory, one seeking its benefits must bring his case fairly within its terms." This is

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the doctrine of many cases. *Fensler v. Prather*, 43 Ind. 119, and cases cited; *Conway v. Campbell*, 38 Mo. App. 473; *Coykendall v. Constable*, 48 Hun, 360; *Lawson v. Buckley*, 49 Hun, 329. The surety must either pay what he has undertaken to pay, or else do what the statute bids him. *Harris v. Newell*, 42 Wis. 687; *Dane v. Corduan*, 24 Cal. 157; *Smith v. Freyler*, 1 Pac. 214; *Halstead v. Brown*, 17 Ind. 202; *Kaufman v. Wilson*, 29 Ind. 504; *Savage v. Carleton*, 33 Ala. 443; *Bethune v. Dozier*, 10 Ga. 235; *Baker v. Kellogg*, 29 Ohio St. 663. The principle here asserted was declared and enforced in the case of *Barnes v. Sammons*, 128 Ind. 596.

The argument of appellant's counsel is refuted by the suggestion that it is not the right of a party to substitute a remedy of his own for one provided by law, and what is said as to the solemnity of a notice by suit tends to impress us that the doctrine contended for is a pernicious one, rather than a salutary one. It is pernicious, because a party ought not to be vexed by a suit when a simple notice will secure him ample relief. It is pernicious, because the object of the law is to prevent litigation, not to encourage it.

It is evident from what we have said that, even if we should consider the exhibits as part of the pleadings and assign to them the effect ascribed to them by the appellant, the result would be the same, for the suit, no matter what its character, could not operate as a notice.

It is proper to suggest that we do not consider the effect of the judgment in the case brought by the appellant, but if we should, the probability is that we should be compelled to treat it as a former adjudication, conclusively precluding the appellant from setting up any such defence as that here attempted to be pleaded.

So far as concerns the general statements of fraud it is enough to say that no facts are pleaded constituting fraud, and that epithets can not supply the place of substantive facts.

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The questions arising on the cross-complaint are the same as those presented by the answer, and they are disposed of by what we have said regarding the latter pleading.

Judgment affirmed.

MILLER, J., did not take any part in the decision of this case.

Filed Sept. 17, 1891; petition for a rehearing overruled Nov. 18, 1891.

No. 15,386.

CARPENTER ET AL. v. RUSSELL ET AL.

MORTGAGE.—Foreclosure.—Sheriff's Sale.—Offer of Rents and Profits.—In a foreclosure proceeding, it is not necessary for the sheriff to offer the rents and profits of all the tracts together before offering to sell the fee.

SAME.—Rule of Property.—The case of *Adler v. Sewell*, 29 Ind. 598, has become a rule of property, and where a sheriff's sale has been made in accordance with the rulings in that case it will not be disturbed.

SAME.—Sheriff's Deed.—Sufficiency of.—A sheriff's deed giving the names of the mortgagors and owners of the land sold, and such a description of the judgment and decree that there can be no mistake in its identification as the one authorizing the sale of the premises, is sufficient.

From the Allen Superior Court.

R. Lowrey, for appellants.

J. A. Woodhull, for appellees.

MILLER, J.—This was an action in ejectment, brought by the appellees against the appellants.

The question we are called upon to consider arises upon the overruling of a motion made by the appellants for a new trial.

The real estate in controversy consisted of more than one tract of land. A decree of court, upon a foreclosure of a mortgage against the appellants, directed a sale of the prem-

Carpenter et al. v. Russell et al.

ises in parcels. The return of the sheriff shows that he offered for sale the rents and profits of each parcel of land for a period of years, not exceeding seven, by the year; and, receiving no bid, he then offered, in like manner, the fee simple of the first tract; and, receiving no bid, then offered the second tract, and receiving no bid, he offered in like manner the third; and, receiving no bid, he offered, *seriatim*, the fee simple of each parcel; and, receiving no bid, he then offered and sold the fee simple of the whole tract. It is claimed by the appellants that it was his duty to offer to sell the rents and profits of all the tracts together before offering to sell the fee.

The method of sale pursued by the sheriff is in accordance with the ruling of this court in *Adler v. Sewell*, 29 Ind. 598. We do not feel called upon to examine the correctness of that decision. We may presume that since that case was determined many sales of real estate have been made in the mode authorized by it, and it has thereby become a rule of property; so that, even if we doubted the correctness of that decision, motives of public policy would prevent us from entering upon a review of its soundness at this late day. *Lindsay v. Lindsay*, 47 Ind. 283; *Carver v. Louthain*, 38 Ind. 530; *Grubbs v. State*, 24 Ind. 295; *Harrow v. Myers*, 29 Ind. 469.

Complaint is also made of a ruling of the court in admitting in evidence a sheriff's deed under which the appellees claim title. The objection made to its admission is that it recites the judgment upon which the sale took place as having been rendered in the year 1888, and it is claimed that the judgment given in evidence shows that it was rendered in the year 1889. We find upon examination that the date of the rendition of the judgment is recited by the clerk as having been rendered on the 24th day of January, 1889; but the transcript of the proceedings of the court, both prior and subsequent to its rendition, shows that the court was held, and judgment rendered, on the 24th day of Janu-

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ary, 1888, and that the clerk, by a mere clerical misprision, recited it as having been rendered in the year 1889. The context not only shows the error, but gives the true date.

The names of only a portion of the defendants against whom the judgment was rendered are set out in the sheriff's deed. It gives the names of the mortgagors and owners of the land sold, and so fully describes the judgment and decree that there can be no mistake in its identification as the one authorizing the sale of the premises. This was all that was necessary.

We find no merit in this appeal.

Judgment affirmed.

McBRIDE, J., took no part in the decision of this case.

Filed Nov. 20, 1891.

No. 15,305.

ANDERSON v. ANDERSON, ET AL.

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MORTGAGE.—*Foreclosure.*—*Redemption by Junior Encumbrancer.*—*Resale.*—A mortgagee who buys in the land himself, at the foreclosure sale, can not, after redemption by a junior encumbrancer, resell the land to enforce payment of an unsatisfied part of his judgment.

SAME.—*Right to Redeem.*—*Statutes Creating.*—*Alteration.*—Statutes creating a right to redeem may be altered. The right to redeem relates to the remedy, and is not so essentially and intrinsically a contract right as to be entirely beyond legislative control.

From the Clinton Circuit Court.

S. H. Doyal and *P. W. Gard*, for appellant.

J. Claybaugh and *R. P. Davidson*, for appellees.

ELLIOTT, J.—On the 3d day of January, 1876, Jeremiah Anderson executed a promissory note to the appellant, and, to secure payment of the note, Jeremiah and his wife Sarah

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executed a mortgage to the appellant. Suit was brought on the note and mortgage, a judgment for \$7,178 was recovered against Jeremiah, and a decree foreclosing the mortgage was rendered. On this judgment and decree the mortgaged land was sold for \$3,000, and subsequently other property was sold for \$1,500. The avails of the sales under the judgment were not sufficient to pay the judgment, but left the sum of \$3,020 unpaid. In November, 1887, Sarah Anderson recovered judgment against Jeremiah Anderson for \$1,516. On the 20th day of January, 1888, she redeemed the land described in the mortgage executed to the appellant. The appellant's position is that he is entitled to have the land sold to himself and redeemed by Sarah Anderson again sold to satisfy the \$3,020 remaining unpaid upon his judgment against Jeremiah Anderson.

Counsel argue that the lien of the mortgage was not merged, and that the lien still exists, notwithstanding the sale, and refer us to the case of *Teal v. Hinchman*, 69 Ind. 379. It is true that the lien of a mortgage is not always merged in a judgment, and that equity will preserve the lien when necessary to prevent injustice. *Evansville, etc., Co. v. State, ex rel.*, 73 Ind. 219; *Pence v. Armstrong*, 95 Ind. 191 (207).

But the doctrine stated does not rule such a case as this. The principle which controls the present case may be thus stated: The sale on a judgment or decree exhausts it as to the property sold, and the judgment creditor can not, after redemption by a junior encumbrancer, resell the land to enforce payment of an unsatisfied part of his judgment. *Horn v. Indianapolis Nat'l Bank*, 125 Ind. 381; *Green v. Stobo*, 118 Ind. 332; *Hervey v. Krost*, 116 Ind. 268; *Simpson v. Castle*, 52 Cal. 644; *People, ex rel., v. Easton*, 2 Wend. 298; *Russell v. Allen*, 10 Paige, 249; *Clayton v. Ellis*, 50 Iowa, 590.

The object of the law is to compel creditors to bid a fair and adequate price for the debtor's property, and to prevent

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them from bidding a small sum, and, in the event of a redemption, again subject the property to sale. The policy of the law—and it is a sound and just one—is to prohibit the creditor from selling the property more than once for his own benefit, and to secure a just and fair price for the property in the first instance. Another purpose is to discourage the practice of creating costs by making repeated sales on the same judgment. The case of *Greene v. Doane*, 57 Ind. 186, has been disapproved in many decisions and by the text-writers generally. Our own decisions have emphatically asserted that even if that case was well decided under the statute then in force (which is questioned in some of the cases), it does not express the law as it now exists.

It is a mistake to suppose that the law intends that the redemption by a junior encumbrancer shall be for the benefit of the creditor, upon whose judgment the land was sold; for, on the contrary, the right of redemption is created for the benefit of the debtor and junior encumbrancers. When a junior encumbrancer redeems he does so, in contemplation of law, for his own benefit, and not for that of the creditor upon whose judgment the sale was made. *Porter v. Pittsburgh, etc., Co.*, 122 U. S. 267.

It is insisted by the appellant's counsel that the case is governed by the statute enacted prior to 1881, and that the decision in *Greene v. Doane*, *supra*, controls. But this position is untenable. Even if it were conceded that the doctrine of *Greene v. Doane*, *supra*, is sound, it would not follow that it governs here. It has been directly decided by the Supreme Court of the United States, and impliedly by this court, that statutes creating a right to redeem may be altered. The right to redeem is solely the creature of statute; it relates to the remedy, and is not, as it is held, so essentially and intrinsically a contract right as to be entirely beyond legislative control. *Connecticut, etc., Ins. Co. v. Cushman*, 108 U. S. 51; *Davis v. Rupe*, 114 Ind. 588;

Hartlepp *et al.* v. Whiteley *et al.*

Hervey v. Krost, supra; Parker v. Dacres, 130 U. S. 43;
Freeman Executions, section 314.

Judgment affirmed.

Filed Nov. 20, 1891.

No. 15,083.

HARTLEPP ET AL. v. WHITELEY ET AL.

FRAUDULENT CONVEYANCE.—Action to Set Aside.—No Other Property.—Defective Finding.—In a suit by a creditor to set aside a conveyance of property on the ground that it was made to defraud creditors, where the special finding fails to show that the grantor had no property other than the land out of which the debt sued for might have been made, either at the time of the conveyance, or from that time up to the time suit was brought, the defendant is entitled to judgment.

SPECIAL FINDING.—Amendment of After Verdict.—After the rendition of judgment the court can not amend and supply defects in a special finding on motion of one of the parties.

From the Tippecanoe Circuit Court.

I. E. Schoonover, for appellants.

J. McCabe and *E. F. McCabe*, for appellees.

OLDS, J.—The complaint by the appellees in this action was to set aside the conveyance of real estate described therein alleged to have been fraudulently made to appellants by one Kasper Hartlepp, who was a co-defendant in the court below. The cause was tried by the court without a jury, and the court, at the request of appellants, made a special finding of facts, and stated conclusions of law thereon. The appellant excepted to the conclusions of law, as stated by the court.

The appellants also moved the court for a judgment in their favor on the special finding of facts, which was overruled, exceptions reserved by appellant, and judgment rendered for the appellees.

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Hartlepp *et al.* v. Whiteley *et al.*

There was an entire omission to find any facts showing that Kasper Hartlepp, the appellants' grantor, had no property other than the land out of which the debt sued for might have been made, either at the time of the conveyance, or from that time up to the time suit was brought. For aught that appears from the finding, the grantor may have had an abundance of other property out of which the debt might have been made at the time of the conveyance, and from thenceforward up to and at the time suit was brought. The finding of facts was fatally defective, and the court erred in its conclusions of law, also in overruling appellants' motion for judgment on the finding. The finding being silent upon these material facts, it stands as if such facts were not proven, and upon failure to prove such facts appellants were entitled to a judgment. *Brumbaugh v. Richcreek*, 127 Ind. 240, and authorities there cited.

The court sought to remedy the defect in the finding some days after the rendition of the judgment. The appellees, the plaintiffs below, appeared in court and moved the court to amend the special finding "by finding whether or not said defendant Kasper Hartlepp had any property subject to execution other than the lands described in the complaint, from the time of said conveyances to the time of beginning this action." The court sustained the motion and made a finding that Hartlepp had no property other than the land subject to execution at the time of the conveyance, nor at any time thereafter up to the commencement of this action, and stated that such finding was made from the evidence, and ordered that it be entered of the day of the trial, and that it should have the same effect as if made at the day of the trial along with the other findings. This latter action of the court was clearly of no effect. The court can not amend and supply defects in a special finding on motion of one of the parties to a suit after the rendition of the judgment, even if it could do so before judgment. In the case

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of *Clark v. State, ex rel.*, 125 Ind. 1, this court held that the court had no power to alter or change its special finding after it had been returned and entered of record, and the same doctrine has been held in previous decisions of this court. *Wray v. Hill*, 85 Ind. 546; *Levy v. Chittenden*, 120 Ind. 37.

In the opinion of the court justice will be best subserved by the granting of a new trial.

Judgment reversed at costs of appellees, with instructions to the court below to set aside the judgment and grant a new trial.

Filed Oct. 7, 1891.

SUPPLEMENTAL OPINION.

OLDS, J.—In the original opinion we only made a statement showing the controverted question presented for decision, and it should have been more explicit. The appellees, Whiteley, Fassler and Kelley, and James McCabe, joined in the action as plaintiffs, alleging and showing that Whiteley, Fassler and Kelley had a judgment against Kasper Hartlepp which was unsatisfied, and that McCabe held a note executed by said Kasper Hartlepp to him for \$145, due September 1st, 1885, with eight per cent. interest and attorney's fees, and alleging facts showing a fraudulent conveyance and transfer by Kasper Hartlepp of his real estate, and asking judgment in favor of McCabe on his note, and to have the fraudulent conveyance set aside and the land subjected to the payments of the Whiteley, Fassler and Kelley judgment, and the judgment of McCabe.

The facts found show McCabe entitled to his judgment, and judgment was rendered in his favor. The personal judgment in favor of McCabe was authorized by the findings of fact, and should not be set aside, but the judgment setting aside the conveyance by Kasper Hartlepp to James Hartlepp should be set aside.

The mandate of the original opinion is, therefore, hereby modified, and the personal judgment in favor of James Mc-

Springer v. Fenner *et al.*

Cabe is affirmed, and the judgment setting aside the conveyance is reversed, at costs of appellees, and the court ordered to grant a new trial.

Filed May 12, 1892.

No. 15,015.

SPRINGER v. FENNER ET AL.

From the Hamilton Circuit Court.

G. Shirts and *M. Vestal*, for appellant.

W. Booth, for appellees.

OLDS, J.—This is an action for the foreclosure of a mechanic's lien. The appellee, Mrs. Mollie Fenner, wife of the appellee George Fenner, contracted with one Barrett for the building of a house upon a lot owned by her. Barrett contracted with the appellant to furnish certain materials for use in the construction of the house. Springer filed a notice in the recorder's office of the county within sixty days from the date of furnishing the materials, and brings this suit to foreclose the lien. Appellees answered in denial and pleaded payment. There was a trial by the court and finding and judgment for the appellees. The appellant filed a motion for a new trial, which was overruled, and exceptions reserved.

The grounds for the motion for a new trial are that the finding and judgment are contrary to law and are not sustained by sufficient evidence.

Counsel for appellant assume that the evidence is undisputed showing that there is an amount due, and that notice of the indebtedness was given by the appellant to George Fenner, who was the authorized agent of his wife, before all the materials were delivered, and then proceeds to discuss the question as to what is the proper construction to be given to the statute—section 5 of the mechanic's lien law, Acts of 1883, p. 141—contending that a notice is sufficient if given at any time before the owner has paid the contractor.

We have examined the evidence in the record, and find there is some evidence to sustain a finding that the appellant had been paid in full for the amount of materials furnished for the house of Mrs. Fenner before the commencement of this suit.

The questions as to whether her husband was the authorized agent of the wife, and whether even the husband had any notice of the fact that the appellant was furnishing the materials, are disputed, the appellees contending that the husband was not the agent of the wife, and that even he had no notice, and there is some evidence tending to support such contention; but, even if there was not, there is evidence strongly supporting the fact that appellant's account for materials furnished for the house had been fully paid.

Barrett testifies that the appellant had been paid in full for such materials. This being true, the finding of the court is sustained regardless

Deacon v. Van Nuys.

of what construction may be placed upon the section of the statute requiring the giving of notice to the owner or his agent.

There is no error.

Judgment affirmed, with costs.

Filed Sept. 24, 1891.

No. 15,324.

DEACON v. VAN NUYS.

From the Boone Circuit Court.

T. J. Terhune and *B. S. Higgins*, for appellant.

T. W. Lockhart, for appellee.

ELLIOTT, J.—The appellee's complaint proceeds upon the theory that he furnished materials to the appellant for the construction of a house, and that he is entitled to enforce a material man's lien. The appellant contests the right asserted by the appellee upon the ground that the materials were not furnished directly to him, but were furnished to a contractor. The question is, therefore, one of fact to be determined upon the evidence.

The familiar rule that this court will accept as controlling the evidence which the trial court received as trustworthy restricts our investigation to the question: Is there any evidence sustaining the finding of the trial court? We find no difficulty in saying that there is such evidence.

It is true that the materials were originally ordered by Carr, the contractor, but they were delivered directly to Deacon, and by him they were taken from the appellee's place of business. There was, also, other testimony indicating that the sale of the materials was made to the appellant and not to Carr. We can not overthrow the decision of the trial court for the sole reason that Carr gave the order for the materials. A contractor may order materials for the owner, and if he does so, he is the owner's agent. Ordinarily, an order by the contractor does not bind the owner as the primary promisor, but there may be facts which show that the contractor in giving the order acted for the owner, and that, we think, is true of this case.

Judgment affirmed.

Filed Oct. 29, 1891.

END OF MAY TERM, 1891.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1891, IN THE SEVENTY-SIXTH YEAR OF THE STATE.

No. 15,400.

HAYNES v. NOWLIN.

HUSBAND AND WIFE.—*Alienation of Husband's Affections.—Action by Wife.*
 —A married woman may maintain an action against one who wrongfully entices her husband from her and alienates his affections.

From the Dearborn Circuit Court.

W. S. Holman, W. S. Holman, Jr., H. D. McMullen and W. R. Johnston, for appellant.

G. M. Roberts, C. W. Stapp, J. K. Thompson, M. J. Givan and N. S. Givan, for appellee.

ELLIOTT, C. J.—The question which the record presents arises upon the ruling of the trial court sustaining a demurrer to the appellant's complaint. The question which requires our consideration and judgment is this: Can a married woman maintain an action against one who wrongfully entices her husband from her and alienates his affections?

It was the boast of the common law that "there is no

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Haynes v. Nowlin.

right without a remedy," and, in the main, this boast was not an idle one, but was made good by the vindication of legal rights in almost all instances where the right was appropriately presented for judicial consideration and determination. Some of the courts, however, sacrificed the principle outlined in the maxim to the demands of fancied consistency, and surrendered a clear and strong right to a barren technical rule, for they held that a wife could not maintain an action for the loss of the society, support and affections of her husband. The fiction that the *baron* and *feme* were one person so far swayed the judgments of some of the courts as to carry them from a sound fundamental principle, and cause them to declare a doctrine revolting to every right-thinking person's sense of justice, and contrary to the foundation principles of natural right. We say that some of the cases did this, for not all gave the doctrine we refer to support, but, on the contrary, denied it, by holding that the wife might have a right of action against the wrong-doer who took her husband from her. To these cases we shall presently refer. The principle outlined in the maxim quoted requires that, even where the common law as it now exists prevails, it should be held that a wife may have an action against the wrong-doer who deprives her of the society support and affections of her husband. If there is any such thing as legal truth and legal right, a wronged wife may have her action in such a case as this, for in all the long category of human rights there is no clearer right than that of the wife to her husband's support, society and affection. An invasion of that right is a flagrant wrong, and it would be a stinging and bitter reproach to the law if there were no remedy. The virtue of elasticity which has been so often ascribed to the common law, and generally very justly, is nowhere more clearly or beneficially manifested than it is in relation to the rights of married women. Long since the doctrine of feudal times, which gave so many, and such comprehensive rights, to the *baron* and so few, and such narrow

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ones, to the *feme*, has given way before the enlightened thought of better ages and less barbarous times. One who should now, either in England or America, attempt to secure an enforcement of the old rules which placed the wife in such abject subjection to the husband, and stripped her of so many rights which belong, in natural justice, to a rational human being, would find a stern denial. It is beyond controversy that without the aid of statutory enactments the harsh, unreasonable rules of the old common law have fallen before the spirit of enlightened reason and true progress.

The doctrine that the wife could not maintain an action against one who deprived her of her husband violates the old maxim that "Reason is the life of the law," for there can be no reason in a rule which gives the stronger a right of action for an injury and denies it to the weaker. If the strong may maintain an action, the greater the reason why the weak may do so. If the *baron* may recover from one who entices away the *feme*, surely the same reason that supports the rule giving the former a right of action must give a like right to the latter. The reason is the same, but the degree is not, for the reason intensifies in power when invoked by the injured wife. The decisions which denied the wronged wife a right of action broke the line of consistency and marred the symmetry of the law. We have spoken of the decisions under the common law, but we do not feel called upon to discuss them at length; that has been ably done by the courts which have given the subject consideration. *Bennett v. Bennett*, 116 N. Y. 584; *Lynch v. Knight*, 9 H. L. Cases, 577; *Breiman v. Paasch*, 7 Abb. N. C. 249; *Baker v. Baker*, 16 Abb. N. C. 293; *Jaynes v. Jaynes*, 39 Hun, 40; *Warner v. Miller*, 17 Abb. N. C. 221; *Churchill v. Lewis*, 17 Abb. N. C. 226; *Foot v. Card*, 58 Conn. 1.

The decisions to which we have referred, and the authorities they adduce, prove, beyond debate, that even at common law the right of action for a personal wrong was in the wife. We assume, therefore, that the right of action for a

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wrong suffered by the wife was in her, and not in the husband. Any other conclusion is, indeed, logically inconceivable.

As the right of action for a personal injury was always in the wife, she is, of necessity, the real party in interest, and, upon reason and principle, she ought always to have been held to be the party entitled to prosecute the action for the invasion of that right. That it was not so held was owing to the power of the legal fiction that she and her husband were one, for from this fiction came the stiff, unreasonable rule, that in all actions she must join her husband. Equity, however, never gave full recognition to this technical doctrine. Our statute, years ago, gave the wife a right to sue alone, and thus—adopting the chancery doctrine and abrogating that of the common law—broke down the only position upon which it could, with the slightest plausibility, be asserted that she could not sue one who wrongfully took her husband from her, since upon the ground that she could not sue alone was rested the doctrine denying her a right to sue one who enticed away her husband. It was never asserted by the better considered cases, nor by the abler text-writers, that she did not herself possess the substantive right upon which the cause of action was founded. The reason that she could not maintain such an action was, not that she was not the source of the substantive right, but that there was no remedy available to her for the vindication of the right. When the statute supplied the remedy by breaking down the barrier which stood between her and a recovery, it clothed her with full right to enforce her just and meritorious cause of action. We know that in the case of *Logan v. Logan*, 77 Ind. 558, a different doctrine was declared, but that decision was by a divided court, and the question was not fully considered. Not a single authority was there adduced, nor is there any consistent line of reasoning. We should be strongly inclined to deny the soundness of that decision if it were necessary to do so, but it is not necessary that we should

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overrule it, for, since the cause of action there declared invalid arose, radical changes have been made by statute. The rights, as well as the obligations of married women, have been greatly enlarged. In many cases it has been affirmed of married women that under the present statute "ability is the rule and disability the exception." *Rosa v. Prather*, 103 Ind. 191; *Arnold v. Engleman*, 103 Ind. 512 (514); *McLead v. Aetna L. Ins. Co.*, 107 Ind. 394; *City of Indianapolis v. Patterson*, 112 Ind. 344; *Bennett v. Mattingly*, 110 Ind. 197; *Sirong v. Makeever*, 102 Ind. 578; *Lane v. Schlemmer*, 114 Ind. 296 (301); *Phelps v. Smith*, 116 Ind. 387 (402); *Young v. McFadden*, 125 Ind. 254; *Miller v. Shields*, 124 Ind. 166.

It seems to us very clear that, in view of the facts that true principle requires that a married woman should have a remedy for the vindication of a violated right, and that her rights and obligations have been so greatly increased and enlarged by the enabling statutes, she may have redress against one who wrongfully takes her husband from her.

Every radical and express change in the law carries with it corresponding and incidental changes. These incidental changes are inseparable from the essential express changes, and are wrought by the Legislature. No part of the law can be expressly changed without causing incidental changes. To hold otherwise would be to frustrate the legislative purpose and break the law into isolated parts and disjointed fragments. It must follow from this doctrine that, when the statutes gave a married woman the right to sue alone, and changed her *status* so as to invest her with the general property rights of a citizen and impose upon her almost the same obligations as those resting upon all citizens free from disability, they clothed her with the right to appeal to the courts to redress the wrong inflicted by one who tortiously wrested from her the support, society and affections of the husband.

In adjudging, as we do, that this action can be main-

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tained, we believe that we build on solid principle, and we know that we are sustained by able courts. The authorities already adduced give our conclusion support and to them we add: *Seaver v. Adams* (N. H.), 17 Atl. R. 776; *Mehrhoff v. Mehrhoff*, 26 Fed. R. 13; *Westlake v. Westlake*, 34 Ohio St. 621; *Postlewaite v. Postlewaite*, 1 Ind. App. 473. See, also, *Duffies v. Duffies*, 31 Cent. L. J. 29. The views of the text-writers are in harmony with our conclusion. Mr. Bigelow says: "To entice away, or to corrupt the mind and affections of one's consort is a civil wrong for which the offender is liable to the injured husband or wife." Bigelow Torts, 153. Judge Cooley says: "We see no reason why such an action should not be supported where, by statute, the wife is allowed, for her own benefit, to sue for personal wrongs suffered by her." Cooley Torts, 228, n. Mr. Bishop clearly and strongly states the rule. He says: "Within the principles which constitute the law of seduction, one who wrongfully entices away a husband, whereby the wife is deprived of his society, and especially also of his protection and support, inflicts on her a wrong in its nature actionable. We have seen that by the common law rules, which forbid the wife to sue for a tort except by joining the husband as co-plaintiff, she is practically without an available remedy. But under the modern statutes as they are shaped in many of our States, she can hold property at law, bring suits to secure it, and maintain actions of tort, in her own name and with no interference from her husband. So that where a statute of this sort prevails, she has her action against the seducer of the husband, who has thus wrongfully deprived her of his society and care." 1 Bishop Marriage and Divorce, section 1358.

Judgment reversed.

Filed Dec. 8, 1891.

Meurer v. The State.

No. 16,096.

MEURER v. THE STATE.

CRIMINAL LAW.—Manslaughter.—Self-Defence.—On the trial of an indictment for manslaughter, the defendant testified that when he shot the decedent the decedent was about seven steps away from him, had thrown at him his weapon, an ax, and was turning away from him.

Held, that a claim of self-defence was not tenable, and that a verdict of guilty was sustained by the evidence.

NEW TRIAL.—Newly-Discovered Evidence.—A new trial will not be granted because of newly-discovered evidence which is merely cumulative; nor will a new trial be granted on account of newly-discovered evidence when the sole purpose of such evidence is impeachment; and the fact that the party was surprised by the testimony of the witness proposed to be impeached or contradicted will not change the rule.

From the Knox Circuit Court.

W. A. Cullop, C. B. Kessinger and J. S. Pritchett, for appellant.

A. G. Smith, Attorney General, for the State.

McBRIDE, J.—On the morning of September 18th, 1890, the appellant, with two brothers, engaged in a fight with four brothers named Blevins. During the contest the appellant shot and killed Rufus Blevins. For this he was tried and convicted of voluntary manslaughter. He moved for a new trial, alleging several reasons, but the circuit court overruled his motion. The only errors argued arise on this ruling, and relate to two of the reasons assigned for a new trial. These reasons are: 1st. Surprise, and 2d. That the evidence does not support the verdict. The appellant insists that the killing was in self-defence.

On the trial, one Omar Davis testified as a witness for the State to certain facts which if true were material as bearing on the claim that the killing was in self-defence. He was directly contradicted on every material point by three witnesses in addition to the appellant.

The surprise of which the appellant complains was in the

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Meurer v. The State.

testimony of Davis, who, the appellant swears, several times before the trial assured him that he knew nothing whatever of the matter, and who also testified as a witness at the coroner's inquest that he knew nothing of it. The appellant also produced the affidavits of three witnesses who would directly contradict Davis. One of these he did not know of until Davis testified, and could not with reasonable diligence have learned of or produced at the trial. The others, however, were present and testified at the trial on other matters, and no excuse is shown for not then examining them as to the matters of which Davis testifies.

As above stated, Davis was contradicted on every point by three witnesses and by the appellant on the trial. The testimony of the newly-discovered witness, therefore, in so far as it might tend to disprove the facts testified to by him, would have been merely cumulative, and a new trial will never be granted because of newly-discovered evidence which is merely cumulative. *Simpson v. Wilson*, 6 Ind. 474; *State, ex rel., v. Clark*, 16 Ind. 97; *Martin v. Garver*, 40 Ind. 351; *Winsett v. State*, 57 Ind. 26; *Dodds v. Vannoy*, 61 Ind. 89; *Harper v. State, ex rel.*, 101 Ind. 109; *Marshall v. Mathers*, 103 Ind. 458; *De Hart v. Aper*, 107 Ind. 460; *Sutherlin v. State*, 108 Ind. 389.

If it was the purpose by this evidence to impeach Davis, the same result would follow, as a new trial will never be granted on account of newly-discovered evidence when the sole purpose of such evidence is impeachment. *McIntire v. Young*, 6 Blackf. 496; *State, ex rel., v. Clark, supra*; *Martin v. Garver, supra*; *Evans v. State*, 67 Ind. 68; *Sullivan v. O'Conner*, 77 Ind. 149; *Sutherlin v. State, supra*.

If the newly-discovered evidence would be merely cumulative, or could only serve the purpose of impeachment, or both, the fact that the party was surprised by the testimony of the witness proposed to be impeached or contradicted will not change the rule.

There is, however, another and a sufficient reason why the

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motion for a new trial was correctly overruled. The testimony of Davis was only material as bearing on the question of self-defence.

The appellant, as a witness in his own behalf, testified that when he fired the fatal shot the decedent was about seven steps away from him, had thrown at him his weapon, an ax, and was turning away from him. The evidence otherwise also showed, without dispute, that the shot entered the back within an inch and a half of the spinal column and was cut from the breast in front where it had lodged just under the skin. One can not, after his enemy has cast away his weapon and turned to fly, kill him and successfully claim to have been acting in self-defence. This also disposes of the claim that the evidence is not sufficient to sustain the verdict.

Judgment affirmed.

Filed Dec. 9, 1891.

No. 16,248.

KIMERER ET AL. v. THE STATE, EX REL BLACK.

ELECTIONS.—Tie Vote.—Determination of by Lot.—Cases Followed.—Election boards may be compelled, by mandate, to reassemble and determine by lot which of the rival candidates for a township office, who have received an equal number of votes, shall be entitled to the office. Following *Johnston v. State, ex rel.*, 128 Ind. 16, and *Wills v. State, ex rel.*, 128 Ind. 359.

SAME.—Illegal Votes.—The election officers, having counted the votes given for each of the candidates, and certified that the vote was a tie vote, can not be heard, in a proceeding brought to compel them to complete their official duties, to contradict such return, by alleging that illegal votes were received, and that, in fact, there was not a tie.

SAME.—If illegal votes were, in fact, received and counted for either, or both, the candidates, that must be determined by a contest of election, or other appropriate method, after one or the other of the rival candidates shall have received his certificate of election.

SAME.—Election Board.—Mandate to.—Time of Meeting.—It is proper for

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the court, in its mandate, to fix a particular time when the board shall reassemble and proceed to cast lots.

SAME.—*Removal of Member.—Appointment of Successor.*—Where, pending the mandate proceedings, one of the judges of election moves from the State, it is proper for the court to direct the inspector of elections to select one elector of the township of the same political faith of the judge moving away to act in his place, and that they should then proceed to cast lots to determine who should be entitled to the office.

From the Lake Circuit Court.

J. E. Cass and *A. L. Jones*, for appellants.

N. L. Agnew, *S. C. Spencer* and *D. E. Kelley*, for appellee.

MILLER, J.—William T. Brown and Lewis Green were candidates for election to the office of township trustee at an election held in April, 1890, in Washington township of Porter county, and each received an equal number of votes.

This action was instituted to compel the election board to meet and determine by lot the person entitled to the office.

We adhere to the doctrine enunciated in *Johnston v. State, ex rel.*, 128 Ind. 16, and *Wills v. State, ex rel.*, 128 Ind. 359, that section 4736, R. S. 1881, is constitutional, and that such election boards may be compelled, by mandate, to reassemble and determine by lot, which of the rival candidates for a township office, who have received an equal number of votes, shall be entitled to the office.

The appellants, who were the officers of the election board, in their return alleged that the candidates did not receive an equal number of votes at such election, but that one Frank Bundy, who was not a legal voter of the township, voted for one of the candidates, and that the officers of election, being ignorant of the fact that he was not an elector, received and counted his vote, and that, not counting this vote, one of the candidates had a majority.

We are of the opinion that the court did not err in holding this return bad.

The election officers, having counted the votes given for each of the candidates, and certified that the vote was a tie

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vote, can not be heard, in a proceeding brought to compel them to complete their official duties, to contradict such return.

If illegal votes were, in fact, received and counted for either or both the candidates, that must be determined by a contest of election, or other appropriate method, after one or the other of the rival candidates shall have received his certificate of election, when it can be determined, in an action in which proper parties are before the court, which of the candidates received the highest number of legal votes.

The court, in its mandate, fixed a particular time when the board should reassemble and proceed to cast lots. Objection is made to the fixing of a time for the performance of this duty. No objection is made to the time so fixed upon the ground that it was unreasonable, but the objection was to the fixing of any time.

We are satisfied that the action of the court was not only not erroneous, but was eminently proper. Motives of public policy require that the title and right to public offices should be settled speedily, and without such action of the court great delays in assembling an election board would often ensue. Some one must, of necessity, determine when they should reassemble, and it seems eminently proper that the court, in its mandate, should fix the time.

It appears that after the court made the mandate an appeal was taken to this court, and subsequently dismissed, during the pendency of which one of the judges of election moved from the State. After the appeal was dismissed, the relator filed a petition in the court in which the proceedings were had, asking that the appellants be required to meet at the usual place of holding elections in the township, and that the inspector should select one elector of the township, of the same political faith as the judge who had removed from the State, to act in his place, and that they should then proceed to cast lots to determine who should be entitled to the office.

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The appellants appeared to this petition, and made objection to its sufficiency, but the court made the order as prayed for, and this is assigned as error.

It is a familiar rule that a court of "equity never wants a trustee," where a trustee is necessary to effectuate its mandates. It can hardly be supposed that the mere death or removal of an officer of an election board can have the effect of blocking the wheels of justice, and render the courts of the land powerless to compel a township election board to meet and perform a duty commanded by statute and by the mandate of a court; but this is what the position assumed by the appellants would lead to.

In *State, ex rel., v. Bailey*, 7 Iowa, 390 (399), a writ of mandate, addressed to a county judge, was, after the official death of a justice, who was a member of a canvassing board, so amended as to require him to take to his assistance two justices and canvass the returns. See, also, *State, ex rel., v. County Judge, etc.*, 7 Iowa, 186.

That proceedings by mandate do not abate by the death, resignation or removal of some of the officers of corporations or quasi-corporations has often been determined. We cite the following cases: *Thompson v. United States*, 103 U. S. 480; *Snyder v. United States*, 112 U. S. 216; *In re Parker*, 131 U. S. 221; *People, ex rel., v. Supervisor*, 100 Ill. 332.

A number of these cases proceed upon the theory that the action is against the corporation or board in its official capacity, although the officers are mentioned by name, and that changes in the *personnel* of the representatives of such board or corporation do not interfere with the proceedings.

It seems eminently proper in this case that the court should have directed the inspector of elections, whose duty it was to fill vacancies in the election board, and who was a party to the suit, to make the selection of a judge to fill the vacancy in the election board, and to direct him, as far as it could be done, to make the selection in the manner provided by the law in force at the time the election was held.

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We do not decide, however, that this is the only manner in which the board could be filled.

The death of Kimerer having been suggested, this judgment is rendered as of the date of the submission.

Judgment affirmed.

Filed Nov. 23, 1891.

No. 14,588.

GLOVER ET AL. v. THE CITY OF TERRE HAUTE ET AL.

MUNICIPAL CORPORATION.—Lots.—When property is platted into lots and marked in such a way as to impress upon it the character of urban property as distinguished from rural use, the subdivisions are regarded as "lots" within the meaning of the statute authorizing the annexation of territory platted into lots.

SAME.—Annexation.—Motive.—Taxes.—Injunction.—The motive of a city in annexing territory can not be inquired into in an action to enjoin the collection of taxes levied on the property by the city.

From the Vigo Superior Court.

N. G. Buff, H. C. Pugh and G. E. Pugh, for appellants.

OLDS, J.—This action was brought by the appellants against the appellees to enjoin the collection of certain city taxes assessed against the property of the appellants. The trial resulted in a judgment in favor of the appellees. The question presented relates to whether or not the lots owned by the appellants, and against which taxes are assessed, were legally annexed to and became a part of the corporation of the city of Terre Haute. There is no brief filed on behalf of the appellees, and no defects in the proceedings to annex the territory pointed out by counsel for appellants in their brief. The territory so owned by the appellants, and annexed by the city, was subdivided and platted into lots ranging from two and one-half to five and ten acres; some of

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| 150 | 569 |
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the lots were built upon and used as residence property; some were fenced and used as pasture lots, and some were not fenced, and constituted an open commons, when the property was annexed, some fifteen years before this suit was brought. It is contended that the lots, being larger than the ordinary city lots, are not "lots" within the meaning of the statute authorizing the annexation of territory platted into lots, but this question has been settled adversely to the contention of the appellants. *Collins v. City of New Albany*, 59 Ind. 396; *City of Evansville v. Page*, 23 Ind. 525.

In the latter case it is held that when property is platted into lots and marked in such a way as to impress upon it the character of urban property, as distinguished from rural use, the subdivisions are regarded as "lots" within the meaning of the statute, and this doctrine was approved in the former case. *Edmunds, etc., v. Gookins*, 24 Ind. 169.

The further objection of counsel is that the city has been neglectful of its duty in extending water-works, street improvements and lights into this portion of the city, and that, by such neglect, they have forfeited their right to treat it as a part of the city, though the city has maintained a school in this portion of the city, contending that the purpose and object of the city in making the annexation was simply to increase the revenues of the city by the taxation of this property. We can not agree with this theory of counsel. The motive of a city in annexing territory can not be inquired into in an action to enjoin the collection of taxes levied on the property by the city. *City of Logansport v. Seybold*, 59 Ind. 225; *Thornton Indiana Municipal Law*, 3195, 3196, and notes.

There is no error in the record.

Judgment affirmed, with costs.

Filed Dec. 8, 1891.

No. 15,259.

THE AURORA NATIONAL BANK OF AURORA v. BLACK
ET AL.

CORPORATION.—*Lien.—Wages of Employees.—Insolvent Corporation.—Transfer of Property.—What is "Property"—To What Property Lien First Attaches.—Notice.*—A corporation went into the hands of a receiver on the 19th of May, 1888. It had been hopelessly insolvent for more than thirty days prior to that time. On the 5th of May the corporation entered into a written contract for the purchase of a large quantity of scrap-iron, to be delivered within thirty days after the date of the contract. On the day before the appointment of the receiver the corporation sold and assigned said contract to the appellant. The iron was delivered to the appellant and sold by him.

Held, that the contract for the delivery of the iron was "property" within the meaning of section 1285, R. S. 1881, and that the employees of the insolvent corporation, having fully complied with the statutory requirements (sections 5286 and 5287, R. S. 1881), acquired a lien thereon for their unpaid wages.

Held, also, that the corporation could not avoid the lien given by statute by transferring its property before the notice of the intention to hold a lien was filed in the recorder's office.

Held, also, that those dealing with insolvent corporations must take notice that the wages of employees are a lien upon their property, and that the title acquired by purchase or otherwise from such a corporation is subject to such lien.

Held, also, that the contract for the delivery of the scrap-iron being the last property transferred by the insolvent corporation, the same was subject to the payment of the liens held by the employees before resort could be had to property transferred at an earlier date.

From the Dearborn Circuit Court.

H. D. McMullen and *W. R. Johnston*, for appellant.

G. M. Roberts and *C. W. Stapp*, for appellees.

COFFEY, J.—On the 19th day of May, 1888, the business of Cobb's Iron and Nail Company, a corporation organized under the laws of the State of Indiana, was suspended by the action of its creditors, and its assets went into the hands of a receiver. It had been hopelessly insolvent for more than thirty days prior to such suspension. At the time its assets went

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| 129 | 505 |
| 135 | 178 |
| 129 | 505 |
| 145 | 632 |
| 129 | 505 |
| 166 | 5 |

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into the hands of the receiver it was largely indebted to its employees, who took steps to acquire a statutory lien on all the property of the corporation. On the 28th day of May, 1888, the employees brought suit in the Dearborn Circuit Court to enforce their liens against the property, making the appellant and others, who claimed an interest in such property, parties thereto. Judgment was rendered on the respective claims of the employees, and the same were declared, by proper decree, to be preferred liens, and ordered to be paid by the receiver out of the first money received by him.

It appears by the special finding of facts in the cause that, on the 5th day of May, 1888, the corporation entered into a written contract with the Bradford Iron and Metal Company, by which it purchased and paid for two hundred and fifty tons of scrap-iron at the agreed price of \$5,125. At the time of such purchase the Bradford Iron and Metal Company did not have the scrap-iron on hand, but the same was to be delivered at the city of Aurora, Indiana, within thirty days after the date of the contract. On the 18th day of May, the day before the appointment of the receiver, Cobb's Iron and Nail Company sold and assigned the contract for the scrap-iron to the appellant for the agreed price of \$5,000, \$3,000 of which was paid in cash and the remaining \$2,000 was paid by the surrender of notes which the appellant held against the iron and nail company. The Bradford Iron and Metal Company complied with the contract by delivering the scrap-iron to the appellant. The appellant sold the scrap-iron for the sum of \$3,500, and received the money therefor, and still retains it.

The court found that the contract for the scrap-iron was of the value of \$3,500, and stated as a conclusion of law that the liens of the employees of the corporation attached to such contract, and decreed that the appellant pay into court the amount received by it as the proceeds of the sale of the scrap-iron.

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To this conclusion of law the appellant excepted.

The question presented necessarily involves the construction of our statutes enacted for the benefit of employees.

Section 5286, R. S. 1881, is as follows: "The employees of any corporation doing business in this State, whether organized under the laws of this State or otherwise, shall be, and they are hereby entitled to have and hold a first and prior lien upon the corporate property of any corporation, and the earnings thereof, for all work and labor done and performed by such employees for such corporation, from the date of their employment by such corporation; which lien shall lie prior to any and all liens created or acquired subsequent to the date of the employment of such employees by such corporation, except as in this act provided."

Section 5287 provides that any employee wishing to acquire such lien upon the corporate property of such corporation, or the earnings thereof, shall file in the recorder's office of the county where such corporation is located or doing business, notice of his intention to hold a lien upon such property and earnings for the amount of his claim, setting forth the date of such employment, the name of the corporation, and the amount of such claim. When recorded, this section provides that the lien so created shall relate to the time when such employee was employed, or to any subsequent date during such employment, at the election of the employee, and shall have priority over all liens suffered or created after such employment, except the liens of other employees, over which there shall be no such priority.

Section 5290 provides that in all proceedings commenced under this act the defendant may file a written undertaking, with surety to be approved by the court, to the effect that it will pay the judgments that may be recovered and costs, and thereby release its property from the liens acquired.

It is not disputed that the employees of Cobb's Iron and Nail Company complied, strictly, with the provisions of section 5287, *supra*, in the matter of acquiring their liens,

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but it is insisted by the appellant that, inasmuch as the title to the iron, purchased under the contract assigned to it, never vested in the nail company, there was no property to which the lien could attach; while, on the other hand, it is contended by the appellees that the contract for the delivery of the iron was property, and that, as such, it was subject to the lien for wages due from the company to its employees.

It was the purpose of the Legislature in enacting this statute to secure to employees of corporations an efficient remedy for the collection of money due them for wages.

Such statutes are not only constitutional, but they are to be liberally construed with a view of rendering effectual the purpose of the statute. *Warren v. Sohn*, 112 Ind. 213; *Bass v. Doerman*, 112 Ind. 390; *Pendergast v. Yandes*, 124 Ind. 159.

It was the intention of the Legislature, we think, that employees should have a lien upon all the property owned by the corporation from which wages was due them at the time notice of a lien was filed in the recorder's office. Was the contract in controversy "property" within the meaning of the statute, and did the appellant take it free from the lien, having procured the assignment before notice of the intention to hold a lien was filed?

Section 1285, R. S. 1881, provides that the phrase "personal property" shall include goods, chattels, evidences of debt and things in action, and that the word "property" shall include personal and real property.

That the contract for the delivery of the scrap iron therein mentioned was "property" seems to be abundantly established by the authorities. *Bouvier Law Dic.*, title "Property," p. 387; *Dunning v. Rogers*, 69 Ind. 272.

We are of the opinion that the corporation could not avoid the lien given by statute by transferring its property before the notice of the intention to hold a lien was filed in the recorder's office. Such a construction of the statute would

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place it in the power of corporations to defeat the purpose the Legislature had in view, as they might, upon approaching insolvency, defeat such liens by selling and transferring all their property. Those dealing with such corporations must know the law and must take notice that the wages of employees is a lien upon their property, and that the title acquired by purchase or otherwise from a corporation is subject to such lien.

We are, therefore, of opinion that the contract in controversy was properly within the meaning of the statute under consideration, and that the employees of Cobb's Iron and Nail Company acquired a lien thereon for their unpaid wages.

A controversy arose among the numerous owners of the property formerly owned by the corporation and persons holding liens thereon, as to what property should be first exhausted in payment of the liens due from the company to the employees.

It appears from the special finding of facts that the contract for the delivery of the scrap-iron, transferred to the appellant, was the property last transferred by Cobb's Iron and Nail Company. The court stated as a conclusion of law that this contract should be subject to the payment of the liens held by the employees before resort was had to property transferred at an earlier date.

In this we do not think the court erred. Where several parcels of property are encumbered by a lien to secure a debt due from the owner, and such owner disposes of the property in parcels to different persons at different periods, the property last disposed of must be exhausted in payment of the debt before resorting to the other parcels. There is no contribution in such cases. *Savings Bank v. Creswell*, 10 Otto, 630; *Britton v. Updike*, 3 N. J. Eq. 125; *Gouverneur v. Lynch*, 2 Paige, 300; *Hahn v. Behrman*, 73 Ind. 120; *Houston v. Houston*, 67 Ind. 276; *Aiken v. Bruen*, 21 Ind.

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137; *McCullum v. Turpie*, 32 Ind. 146; *Henderson v. Truitt*, 95 Ind. 309; *Higham v. Harris*, 108 Ind. 246.

In such cases the purchasers must answer in the order in which they have purchased, the last purchaser first and the first purchaser last. The same rule applies to subsequent liens placed upon the property in good faith.

In this case the liens for wages due the employees of the corporation covered all the property owned by such corporation, and was a common burden. All who acquired title to such property, or liens upon it, acquired such title or lien subject to the prior and superior liens of those to whom wages were due. For the payment of such superior lien the property last owned by the corporation should be first exhausted, and so on back, in the inverse order of its disposition by the owner at the time the superior lien attached. This was the view entertained by the circuit court, and it follows that its decree, based upon this view of the law, was not erroneous.

Judgment affirmed.

Filed Dec. 8, 1891.

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Held, that where a part of several co-parties appeal without complying with section 635 or 638, the defect can not be remedied, after the time limited for effecting appeals has expired, by filing in the Supreme Court a written appearance of a party not appealing and his refusal to join in the appeal. *Holloran v. Midland R. W. Co., 274*

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Mayer v. Myers, 366

CHURCH.

1. *Deed of Trust*.—*Propagation of Certain Doctrines*.—*Diversion of Trust*.—Where property has been dedicated by way of trust to support and propagate any definite doctrines or principles, and is being diverted

from the use intended by the donor, by teaching a doctrine different from that contemplated at the time the donation was made, it is the duty of the court to make such orders in the premises as will secure a faithful execution of the trust confided. But, to induce a court of equity to interfere, the case must present a plain and palpable abuse of trust.

Lamb v. Cain, 486

2. *Same.—Ecclesiastical Decisions.—How Regarded by Civil Tribunals.*—Where a civil right depends upon some matter pertaining to ecclesiastical affairs, the civil tribunal tries the right and nothing more, taking the ecclesiastical decisions out of which the civil right arises as it finds them, and accepts such decisions as matter adjudicated by another legally constituted jurisdiction. *Ib.*
3. *Same.—Manner of Determining Right of Property of Organization.—Amendment of Church Constitution.—Powers of General Conference.*—Property was deeded to persons named in the deed as trustees, and to their successors in office, in trust, for the Church of the United Brethren in Christ, to have and to hold "as long as said society may continue to use the meeting house as a house of religious worship, for the use of the members of the society of such church in the United States according to the rules and discipline which from time to time may be agreed upon and adopted by the church at their general conference, and in further trust and confidence that they shall at all times forever thereafter permit such ministers and preachers belonging to such church as shall from time to time be duly authorized by the said general conference to preach and expound God's holy word therein." *Held*, that, under the constitution of said church, the general conference has power to determine what is the constitution under which it acts, and to determine what is the confession of faith of the church which it represents.
Held, also, that the amended constitution, etc., of said church was properly adopted by its membership, two-thirds of the members voting on the question voting in favor thereof.
Held, also, that when the general conference resolved that a revised confession of faith and amended constitution had become the fundamental belief and organic law of said church (two thirds of the members of the church voting, having voted in favor thereof), and that it would be in force after a certain date, the same was in force after that date.
Held, also, that those who adhered to the amended constitution and revised confession of faith constitute said church, while those who refuse to do so must be regarded as seceders, the revised confession of faith not being unscriptural or antagonistic to the doctrines, etc., of the church which existed at the time of the execution of the deed to the land in controversy. *Ib.*
4. *Same.—Amendment of Constitution.—Proportion of Votes Necessary.*—Where a two-thirds vote was required to amend the constitution of said church, it is not necessary that two-thirds of the entire membership of the church should vote in favor of so amending, but simply that two-thirds of those actually voting, should vote in favor thereof. *Ib.*

CIRCUIT COURT.

See JURISDICTION, 3.

COLLATERAL ATTACK.

See JUDGMENT, 2.

CONDITION SUBSEQUENT.

See DEED, 1.

CONSTITUTIONAL LAW.

See APPROPRIATION; STATE BOARD OF AGRICULTURE.

1. *Obligation of Contract.—Statute Reducing Interest on Redemption from Mortgage.*—A statute enacted subsequently to the execution of a mortgage, reducing the rate of interest which the purchaser might receive on his bid in case of redemption from ten per cent. to eight per cent., is not unconstitutional as impairing the obligation of a contract between the mortgagor and the mortgagee. *Robertson v. Van Cleave, 217*
2. *Title of Laws.*—The act of February 25th, 1891 (Acts 1891, p. 29), entitled "An act creating the office of State supervisor of oil inspection, prescribing the duties thereof and providing for the appointment of such supervisor, abolishing the office of chief of the division of mineral oils and State inspector of oils, repealing all laws inconsistent therewith, and declaring an emergency," is not unconstitutional as violating the constitutional provision that "Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title." *State, ex rel, v. Carr, 44*
3. *Same.—Statutory Office.—Termination of by Legislature.*—The term of the incumbent of a statutory office may be ended by the Legislature at any time, and provision made for the selection of his successor. *Ib.*
4. *Same.—Abolishing Office.—Creation of New One.*—Where the Legislature in abolishing one office and creating another determines that the new duties to be performed or new burdens imposed are sufficient to make a new office, such determination will not be interfered with by the Supreme Court if the act is otherwise valid. *Ib.*
5. *Same.—State Supervisor of Oil Inspection.—Appointment of by State Geologist.*—Under section 1, article 15, of the Constitution, providing that "All officers whose appointments are not otherwise provided for in this Constitution shall be chosen in such manner as now is, or hereafter may be, prescribed by law," the Legislature may confer upon the State geologist the power to appoint a State supervisor of oil inspection. *Ib.*
6. *Title of Acts of Legislature.* The title of an act need not go into details. It is sufficient if it indicates with reasonable precision and clearness the subject it embraces. Nor is an act invalid because it includes details not mentioned in the title, provided the details are germane to the general subject designated in the title. *Benson v. Christian, 535*

CONTINUANCE.

See COURTS.

Judicial Discretion.—Reversal of Judgment.—While granting or refusing a continuance on account of an absent witness is a legal question, it necessarily involves much of judicial discretion, and the Supreme Court will reverse only where it appears that such discretion has been abused to the injury of the complaining party.

Cerealine Mfg. Co. v. Bickford, 236

CONTRACT.

See STATUTE OF FRAUDS.

1. *Breach of.—Measure of Damages.—Injunction.*—Where the parties to a contract have agreed upon the damages which may be recovered for a breach thereof, the remedy is for the recovery of the sum thus fixed, and injunction will not lie. The sum fixed by the parties themselves in their contract will, in the absence of fraud, be deemed to be adequate, and the proper measure of damages by the court. *Martin v. Murphy, 464*
2. *Same.—Restraint of Trade.—Stipulated Penalty.—When Same Can be Re-*

covered.—Where a physician, upon selling out his business, agreed “to practice medicine no more” after a certain date in the town where he had been following his profession, and the contract further provided that a stipulated penalty should be paid if the agreement was broken, the penalty is recoverable in an action based upon the breach of the agreement. For construction of the peculiar phraseology of the contract, see opinion. *Ib.*

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 1, 4.

CORPORATION.

See STATE BOARD OF AGRICULTURE; TAXES, 2.

1. *Transfer of Stock.—Rights of Creditors.*—The stockholders of a corporation transferred their paid-up stock and the corporate property to the president thereof, who executed a mortgage on the property to secure the purchase-price of the stock and borrowed money, agreeing also to pay all debts and liabilities of the corporation. The mortgage and the deed to the property were recorded. Stockholders, with knowledge of the transfer, were also stockholders of another corporation, and to the latter corporation the former became indebted for goods furnished after the deed and mortgage were placed on record.
Held, that the record of the deed and mortgage was constructive notice to the creditor corporation, and that it was not entitled to have the deed and mortgage set aside for fraud.
Parke County, etc., Co. v. Terre Haute, etc., Co., 73
2. *Same.—Withdrawal of Stock.—Statute.*—A transfer of paid-up stock and the property of a corporation by some of the stockholders to another stockholder, who assumes all liabilities and executes a mortgage on the property to secure the purchase-price of the stock, is not, in effect, a withdrawal of the capital stock from the corporation. Section 3858, R. S. 1881, authorizes the transfer of stock of a corporation when paid in, the transfer to be made in such manner as the by-laws of the corporation may prescribe. In the absence of a showing to the contrary, the transfer will be presumed to have been made in accordance with the by-laws. *Ib.*
3. *Misappropriation of Corporate Funds by Officers.—Action by Stockholder for Receiver.—Pleading.*—Where a majority of the directors of a corporation are charged with a misappropriation and conversion of the assets of the corporation, a complaint by a stockholder for an accounting and the appointment of a receiver need not allege that before the commencement of the action a demand was made upon the directors to bring suit in the name of the corporation.
Wayne Pike Co. v. Hammons, 368
4. *Same.—Conversion.—Interest.*—Where the secretary and treasurer of a corporation fraudulently appropriates to his own use, under the guise of salary, large sums of money belonging to the corporation, he is liable for interest on the amount so appropriated. *Ib.*
5. *Same.—Turnpike Company.—Refusal of Officers to Make Repairs.—Appointment of Receiver.*—Where the owners of the majority of the corporate stock of a turnpike company neglect and refuse to make needed repairs in the roadway, thus rendering the property non-productive, the court may properly appoint a receiver. *Ib.*
6. *Same.—Sale of Property.—Decree.*—Where a suit brought by a stockholder against a corporation and its officers merely seeks an accounting and the appointment of a receiver, a decree ordering a sale of the property is erroneous. *Ib.*

7. *Lien.—Wages of Employees.—Insolvent Corporation.—Transfer of Property.—What is "Property."—To What Property Lien First Attaches.—Notice.*

A corporation went into the hands of a receiver on the 19th of May, 1888.* It had been hopelessly insolvent for more than thirty days prior to that time. On the 5th of May the corporation entered into a written contract for the purchase of a large quantity of scrap-iron, to be delivered within thirty days after the date of the contract. On the day before the appointment of the receiver the corporation sold and assigned said contract to the appellant. The iron was delivered to the appellant and sold by him.

Held, that the contract for the delivery of the iron was "property" within the meaning of section 1285, R. S. 1881, and that the employees of the insolvent corporation, having fully complied with the statutory requirements (sections 5286 and 5287, R. S. 1881), acquired a lien thereon for their unpaid wages.

Held, also, that the corporation could not avoid the lien given by statute by transferring its property before the notice of the intention to hold a lien was filed in the recorder's office.

Held, also, that those dealing with insolvent corporations must take notice that the wages of employees are a lien upon their property, and that the title acquired by purchase or otherwise from such a corporation is subject to such lien.

Held, also, that the contract for the delivery of the scrap-iron being the last property transferred by the insolvent corporation, the same was subject to the payment of the liens held by the employees before resort could be had to property transferred at an earlier date.

Aurora Nat'l Bank, etc., v. Black, 595

COUNTY.

Liability of for Failure of County Commissioners to Keep Jail in Healthy Condition.—A county is not liable for the illness of a prisoner confined in its jail, caused by the failure of the county commissioners to keep the jail in a healthy condition. *White v. Board, etc., 396*

COUNTY AUDITOR.

See *TAXES*, 6.

COUNTY COMMISSIONERS.

1. *Term of Office.*—The act of March 7, 1885 (Acts 1885, p. 69), regulating the term of office of county commissioners, was not intended to change the order of succession, nor lengthen the terms of county commissioners. *Bell v. State, ex rel., 1*
2. *Same.—Duration of Term.*—An act approved February 17, 1838, required each county in the State, except those named in the act, to elect three commissioners for the county at the ensuing election, the person receiving the highest number of votes to serve for the term of three years, the person receiving the next highest two years, and the person receiving the next highest one year. The commissioners elected under the terms of this act organized September 3, 1838. The term of the commissioner from the second district, he having received the least number of votes, expired in one year. The regular succession was kept up until 1869. By reason of changing the elections from an annual to a biennial period, the successor of the commissioner from the second district was not elected until the second Tuesday of October, 1870. He held until 1873, and the three-year terms from this district have since been reckoned as beginning with the year 1870, instead of the year 1869. The act of March 1, 1885, provides that the term of office of county commissioners shall be three years, and shall begin on the first Monday in December, and the term of office of no two districts in the same county shall begin in the

same year; and the year in which the term of office in each district shall begin shall be determined by calculating periods of three years from the end of the term for which the commissioner for the same district was elected upon the organization of the board of commissioners for the county.

Held, that the time of the commencement of the term of office of the commissioner from the second district is to be determined by counting periods of three years from the year 1839, when the term of the first commissioner from the second district expired; and that the term held by the previous commissioner from 1869 to 1870 was simply an encroachment on the term of his successor, and did not change the term of office. *Ib.*

3. *Establishment of Highway.—Plea in Abatement.*—In a proceeding before a board of county commissioners to lay out and establish a public highway, it was not error to strike from the files a plea in abatement, in which it was alleged that less than six of the persons signing the petition resided in the immediate neighborhood of the proposed highway. If the party filing the plea possessed the right to appear and contest the jurisdictional fact set up in his plea, he had that right without the filing of any pleading whatever. In such a proceeding the question of jurisdiction can not be made an adversary one. As the plea was improperly filed with the board of commissioners, it was not error for the circuit court to refuse to allow it to be refiled. *Irwin v. Armuth, 340*

4. *Action Against.*—A suit can not be maintained against a board of county commissioners until it has been given an opportunity to act. *Board, etc., v. Tichenor, 562*

5. *Same.—Refusal to Act.—Right of Action Against.*—While no action will lie against the board of county commissioners until an opportunity is given it to act, still, after a refusal to act, an action may be maintained against it. *Ib.*

6. *Same.—County Treasurer.—Suit by to Recover for Erroneous Payments.—Section 6510, R. S. 1881, Construed.*—Section 6510 relates to county revenue only. In an action against a board of commissioners to collect money erroneously paid into the county treasury it was held error to render judgment against the county for any other funds except such as went into the county treasury as county revenue. The county can not be held liable for money erroneously paid in for the use of the State, township or corporations. *Ib.*

COURTS.

Continuance Beyond Term.—The adjournment of the trial of a cause which is in progress the last day of a term to a subsequent day, when the trial is again resumed, is not an adjourned term, but is a continuation of the existing term under the provisions of section 284, Elliott's Supp., and no notice is necessary. *Wayne Pike Co. v. Hammons, 368*

CRIMINAL LAW.

1. *Grand Larceny.—Indictment.—Sufficiency of.—Surplusage.—Repugnant Allegations.*—An indictment for grand larceny is sufficient which, after omitting the surplus and repugnant matter contained therein, charges the defendant with feloniously stealing, taking and carrying away the personal goods of another, of the value of twenty-five dollars or upwards. Under our statute no indictment shall be quashed "for any surplusage, or repugnant allegations, where there is sufficient matter alleged to indicate the crime and person charged." See section 1756, R. S. 1881, subdivision 6. *State v. White, 153*

2. *Filing Information.—Order-Book Entry.*—It is not necessary for the clerk to make an order-book entry of the filing of an information. The mere statement of the clerk that an information was filed, as shown by his file-mark on the back of an information, is sufficient *prima facie* to give jurisdiction. *State v. Matthews, 281*
3. *Same.—Dismissal of Appeal.—Insufficient Showing for.*—Where it is not made to appear that an entry of such filing was made by the clerk upon the order book, the alleged failure of the clerk to copy into the transcript the order-book entry showing the filing of the affidavit in the court below is not available for a dismissal of the appeal in a criminal case, where the clerk states in the transcript that the affidavit and information were filed. *Ib.*
4. *Same.—Embezzlement.—Surviving Partner.—Person Acting in Fiduciary Capacity.—Who is.*—A surviving partner, who is engaged under the statute in winding up the partnership affairs, is acting in a "fiduciary capacity" within the meaning of section 1952, R. S. 1881, defining the crime of embezzlement by administrators, executors, or other persons acting in a fiduciary capacity. *Ib.*
5. *Same.—Assets.—When Deemed in Possession of Surviving Partner by Virtue of Trust.*—When a surviving partner has filed the inventory and bond required, and entered upon the discharge of the duties imposed upon him by law, the assets of the partnership come into his possession by virtue of the trust within the meaning of section 1952. *Ib.*
6. *Same.—Sufficiency of Information.*—An information for embezzlement under the above section, which charges that the money came into the defendant's hands as such surviving partner, is good upon motion to quash. *Ib.*
7. *Change of Venue.—Defective Transcript.—Voluntary Appearance of Defendant.—Jurisdiction.*—Where the venue of a criminal cause was changed on motion of the defendant, and a transcript was filed in the clerk's office of the court to which the change of venue was taken, which transcript was defective, but it appeared by the record that after the filing of such defective transcript, the cause was continued by "consent of parties,"
Held, that it will be presumed that the defendant voluntarily appeared, and submitted himself to the jurisdiction of the court, and consented to a continuance; that the court had jurisdiction, the appearance and agreement constituting a waiver of any mere technical informality in the transmission and certification of the papers. *Burrell v. State, 290*
8. *Same.—Assault with Intent to Kill.—Instruction.*—In a prosecution for assault with intent to kill, it is not error to refuse to charge the jury that, if the evidence showed that the defendant was not interfering with the prosecuting witness, and was seized by him, and in the effort to get away the pistol was discharged, and the prosecuting witness was injured, the defendant should be acquitted. *Ib.*
9. *Same.—Instruction.*—Nor is it error to refuse to charge that "A saloon is a public place in which all persons that so desire may go, and no one has a right to expel another therefrom by force and violence," since those in charge of a saloon may lawfully expel therefrom one who is guilty of gross misconduct and in so doing may use such force as is reasonably necessary to accomplish that result. *Ib.*
10. *Larceny.—Sufficiency of Evidence.*—For evidence held sufficient to sustain a conviction for larceny of a horse, see opinion. *Stalcup v. State, 519*
11. *Former Acquittal Procured by Fraud.—Subsequent Prosecution.—Collateral Attack.*—Where a prosecution is regularly commenced by the prosecuting attorney, and the State is represented throughout by him, but pending the prosecution the prosecuting attorney is bribed to pro-

cure an acquittal, the judgment of acquittal thus procured is not void because of the fraud, but only voidable, and can not be collaterally attacked by the State. *Shideler v. State*, 523

12. *Incest.—Evidence of Acts Prior to Specific Act Charged.*—In a prosecution for incest, it is competent for the State to prove acts of sexual intercourse prior to the specific act charged in the indictment.

Lefforge v. State, 551

13. *Same.—Excessive Sentence.*—A sentence to imprisonment for eight years of one convicted of the crime of incest, after the passage of the act of March 7th, 1891, limiting the maximum term of imprisonment to five years, is void. *Ib.*

14. *Manslaughter.—Self-Defence.*—On the trial of an indictment for manslaughter, the defendant testified that when he shot the decedent the decedent was about seven steps away from him, had thrown at him his weapon, an ax, and was turning away from him.

Held, that a claim of self-defence was not tenable, and that a verdict of guilty was sustained by the evidence. *Meurer v. State*, 587

CROSS-EXAMINATION.

See EVIDENCE, 2.

DAMAGES.

Excessive.—In a suit by an administrator for the wrongful death of his decedent, where the evidence shows that such decedent was a widower, with no children dependent upon him, aged seventy-three, strong and vigorous, and actively engaged in business, a verdict for one thousand dollars damages will not be disturbed as excessive.

City of Wabash v. Carver, 552

DEBTOR AND CREDITOR.

See SUBROGATION.

DECEDENTS' ESTATES.

See CHATTEL MORTGAGE, 2.

Will.—Widow.—Statutory Allowance.—Election to Take Under the Will.—Effect.—Case Distinguished.—Where a husband has made specific provision for his widow, and has also disposed of all his other property in such a way as to make it apparent that the assertion by the widow of the right to take both under the law and under the will would defeat the manifest purpose of the testator, she will be confined to the provisions made by the will, if she elects to take the provision made for her. *Shipman v. Keys*, 127 Ind. 353, distinguished.

Shafer v. Shafer, 394

DEED.

See MARRIED WOMAN, 1.

1. *Condition Subsequent.—Right of Entry.*—A certain piece of land was conveyed by warranty deed to a township for common school purposes, and on the same day the grantors conveyed to the appellant a tract of land of which the land conveyed to the township was a part. The deed to the appellant excepted the lot conveyed to the township, and stated that the "lot was donated for school purposes so long as it shall be used for such purpose." The lot was used for school purposes for thirty years, and was then conveyed by the township trustee to the appellee for value, who has expended a large sum in the improvement of the property.

Held, that the language in the deed to the township does not tend to create a condition subsequent.

Held, also, that if the deed to the township contained a condition subsequent, and the deed to the appellant contained no exception, the

property would revert, upon condition broken, to the grantor or his heirs, and that they alone would have the right of entry or re-entry. *Held*, also, that if the conveyance to the township was upon a condition subsequent, the use of the property for thirty years for school purposes, would be a substantial compliance with the condition.

Higbee v. Rodeman, 244

2. *How Construed.—Exception in Favor of Grantee.—Doubtful Language.*—Where the language of a deed will admit of two constructions, the one less favorable to the grantor is to be adopted. An exception in a deed is to be taken most favorable for the grantee. If the language of a conveyance is doubtful, it must be construed so as to ascertain, if possible, the intention of the parties. *Scott v. Michael*, 250
3. *Same.—What Passes Under it.*—In a conveyance of property, everything essential to the enjoyment of the property is to be considered, in the absence of language indicating a different intention on the part of the grantor, as passing with it, either as a parcel thereof or appurtenant thereto. *Ib.*
4. *Same.—Mill Property.—Conveyance of.—What it Includes.—Maintenance of Dam.*—The conveyance of mill property carries with it, whether the word "appurtenances" be used or not, all the incidents and privileges connected with its use, and this includes the right to maintain a dam, so as to produce a head, or power, equal to that which existed at the time the conveyance was executed. *Ib.*
5. *Same.—Right to Maintain Dam.—Deprivation of Right.—Compensation for Loss.*—The right to maintain a dam at the height it exists at the time of a conveyance of mill property, is of itself property, and a part of the thing sold, and the covenants of the deed extend to and cover the right to maintain the dam at such height, as an incident of the estate and necessary to its enjoyment, and if the grantee is deprived of such right because the grantor had not the right to maintain it at the height covenanted, he is entitled to compensation for such loss. *Ib.*
6. *Same.—Right of Flowage.—Reference to Mortgage.—Effect of.*—Where a deed purported to convey certain mill property, with all its privileges and appurtenances, and then referred to a certain mortgage in which the right of flowage was greatly restricted, the provision in the mortgage can not be regarded as placing a limitation upon the rights and privileges granted. It would require clear and explicit words of limitation to cut down the express and implied grant of the right of flowage as it existed at the date of the execution of the conveyance. *Ib.*
7. *Same.—Direct Language and Words of Recital.—Repugnance Between.—How Construed.*—As between terms directly given as the language of the grantor, and words incorporated by way of recital, from another instrument, in case of repugnance, that which is recited must be rejected, and that which is direct adhered to, as being most likely to express the intention of the parties. *Ib.*
8. *Mistake in Description.—Legal and Equitable Title.*—Where a certain tract of land was sold to A., but by a mistake in the description the deed did not convey all the land purchased, but A. was put in possession of the land intended to be conveyed, and made valuable and lasting improvements thereon, one who thereafter purchased the land omitted by mistake from the deed, with notice of the equitable title of A., took the legal title to the land, subject to such equitable title. *Warbritton v. Demorett*, 346
9. *Reformation.*—A court of equity will reform a written instrument not only in cases of mutual mistake, but also when, by the fraud of

one of the parties to the instrument, the language inserted in it is materially different from that agreed on. *Roons v. Blanton*, 383

10. *Same.—Fraudulent Omission.—Fraud of Husband.—Wife's Excuse for not Having Deed Read.*—Where a husband, after deserting his wife, proposed to her to join him in conveying a tract of land to their children, reserving to her the rents and profits during her life, and the wife, who was unable to read, in good faith joined in the execution of the deed, but the husband procured the deed to be so written that it would convey the fee to the children without the reservation of rents and profits agreed upon, which deed was signed by the wife upon the representation of the husband that it was prepared in accordance with the agreement,

Held, that the wife had a right to rely upon the husband's sincerity, and that a sufficient excuse for her not having the deed read is shown. *Ib.*

11. *Same.—Laches.*—In a suit by the wife for a reformation of such deed, the fraud was admitted and the answer alleged that the suit was not instituted until nine years after the fraud was discovered; that the wife surrendered her possession of the land at the request of the children's guardian; that the guardian rented the land, and expended part of the rents in the improvement of the land and part in compensating the wife for the maintenance of the children; that the guardian, to make the improvements and provide for the maintenance of the children, had anticipated rents and profits for several years in advance.

Held, that the delay of nine years in bringing the suit was not such laches as made the wife's equity stale and barred relief. *Ib.*

12. *Same.—Husband and Wife.—Separation.—Judgment for Alimony no Bar to Action for Reformation.*—A judgment for alimony recovered by the wife in a suit for divorce after the execution of the deed is no bar to the action for its reformation, as there is no question of property rights between the husband and wife. *Ib.*

DELIVERY.

See SALE.

DESCRIPTION OF LAND.

See DEED, 8; VENDOR AND PURCHASER, 4.

DILIGENCE.

See NEW TRIAL, 3, 7.

DISMISSAL OF ACTION.

See FORMER ADJUDICATION, 3.

DISMISSAL OF APPEAL.

See CRIMINAL LAW, 3.

DRAINAGE.

Ditch Assessment.—Delinquency.—The assessment for the construction of a ditch, under sections 4285-4317, R. S. 1881, becomes due upon the acceptance of the work by the surveyor, and where the certificate of acceptance is filed with the auditor in August, the assessment becomes delinquent if not paid on or before the first Monday of November, and the land may be sold. *Cullen v. Straus*, 124 Ind. 340, followed.

White v. McGrew, 548

EASEMENT.

1. *Prescription.—Use for More than Twenty Years.*—Where, by agreement, a right of way is established by mistake over the land of another, and its use is continued for more than twenty years, a title is acquired which is appurtenant to and passes with the land. *Bales v. Pidgeon*, 548

2. *Same.—Effect of Subsequent Survey.*—No survey after twenty years can change the rights of the parties, or entitle the one over whose land such right of way has been established to interfere with its free use. *Ib.*

ELECTION.

See DECEDENTS' ESTATES.

ELECTIONS.

1. *The Vote.—Determination of by Lot.—Cases Followed.*—Election boards may be compelled, by mandate, to reassemble and determine by lot which of the rival candidates for a township office, who have received an equal number of votes, shall be entitled to the office. Following *Johnston v. State, ex rel.*, 128 Ind. 16, and *Wills v. State, ex rel.*, 128 Ind. 359. *Kimerer v. State, ex rel.*, 539
2. *Same.—Illegal Votes.*—The election officers, having counted the votes given for each of the candidates, and certified that the vote was a tie vote, can not be heard, in a proceeding brought to compel them to complete their official duties, to contradict such return, by alleging that illegal votes were received, and that, in fact, there was not a tie. *Ib.*
3. *Same.*—If illegal votes were, in fact, received and counted for either, or both, the candidates, that must be determined by a contest of election, or other appropriate method, after one or the other of the rival candidates shall have received his certificate of election. *Ib.*
4. *Same.—Election Board.—Mandate to.—Time of Meeting.*—It is proper for the court, in its mandate, to fix a particular time when the board shall reassemble and proceed to cast lots. *Ib.*
5. *Same.—Removal of Member.—Appointment of Successor.*—Where, pending the mandate proceedings, one of the judges of election moves from the State, it is proper for the court to direct the inspector of elections to select one elector of the township of the same political faith of the judge moving away to act in his place, and that they should then proceed to cast lots to determine who should be entitled to the office. *Ib.*

EMBEZZLEMENT.

See CRIMINAL LAW, 4.

EQUITY.

See DEED, 9 to 12; JURY; PRACTICE, 7. .

ESTOPPEL.

See FORMER ADJUDICATION, 1.

EVIDENCE.

See BILL OF EXCEPTIONS, 1, 3, 4; CRIMINAL LAW, 10, 12; JUDGMENT, 1; MASTER COMMISSIONER; MECHANIC'S LIEN, 3; MORTGAGE, 5; PRACTICE, 9; SUPREME COURT; TRUST AND TRUSTEE, 2, 3, 5.

1. *Railroad.—Action for Injuries.—Intoxication of Engineer.—How May be Shown.*—In an action against a railroad company for damages for injuries received in an accident, it is proper to show, in support of an allegation in the complaint that the employees in charge of the train were intoxicated at the time of said injury, that the engineer on said train was in the habit of drinking intoxicating liquor, and of visiting a certain saloon, evidence having been introduced tending to prove that he had drank intoxicating liquor at the last station passed by the train before the injury, and about thirty minutes before the accident. *Pennsylvania Co. v. Newmeyer*, 401
2. *Same.—Unproved Fact.—Question Assuming Existence of.—Impropriety of Cross-Examination.—Control of Court Over.*—A question propounded to a witness is improper if it assumes the existence of a fact not

proved or admitted. This applies to cross-examination. The extent to which a cross-examination may be carried is largely under the discretion of the trial court, and a cause will not be reversed for the exercise of such discretion, unless it appears that there has been an abuse of the discretion to the injury of the party complaining. *Ib.*

3. *Same.—Mental Condition of Party.—Non-Expert Witness.*—A witness who is not an expert will not be permitted to give an opinion as to the mental condition of another, without first stating the facts upon which the opinion is based. *Ib.*
4. *Same.—Immaterial Question.*—Where a question is asked of a witness, the answer to which is immaterial under the issues in the case, error can not be predicated upon the refusal of the court to permit the question to be asked. *Ib.*
5. *Same.—Examination of Person.—Party not Required to Submit to.—Medical Experts.*—In the absence of a statute authorizing it, and none exists in this State, a party to an action is not required to submit his person to an examination of his injuries by surgeons appointed by the court for that purpose. *Ib.*

EXAMINATION OF PERSON.

See EVIDENCE, 5.

EXCESSIVE DAMAGES.

See NEW TRIAL, 1.

EXCESSIVE SENTENCE.

See CRIMINAL LAW, 13.

EXCUSING JUROR.

See GRAND JURY.

EXECUTION.

1. *Sheriff's Sale.—Judgment Creditor's Bid.*—It is sufficient to make a sheriff's sale effective, in cases where the judgment creditor is the purchaser, if the amount of the bid is properly credited upon the execution, by his direction and authority. *Robertson v. Van Cleave, 217*
2. *Same.—Holder of Sheriff's Certificate of Purchase.—Redemption from Mortgage Foreclosure.*—The holder of a sheriff's certificate of sale under execution on a judgment may redeem lands sold on a decree of foreclosure of a mortgage made by the judgment debtor, the lien of which is prior to that of the judgment. *Ib.*
3. *Same.—Right of Redemption as Judgment Creditor.—Sufficiency of Application to Redeem, How Determined.*—Such holder of a sheriff's certificate is entitled to redeem in the character of a judgment creditor, and not as owner, and hence the sufficiency of the application must be determined by section 772, R. S. 1881, which requires a statement specifying the amount and date of the judgment, and the amount due and unpaid. *Ib.*
4. *Same.—Right of Redemption.—Purchaser Under Execution.—Equitable Title.—Lien-Holder.*—The title remains in the judgment debtor, not only until the right of redemption is lost, but until the power to redeem no longer exists, and the power to redeem ends only when the holder of the certificate demands a deed. The holder of a sheriff's certificate, who has taken no steps to obtain a deed, is no more than a lien-holder, regardless of the time which has elapsed since the sale. The expiration of the year allowed for redemption enlarges his rights by adding to his lien an equitable interest in the land sold. If he demands a deed, he acquires a legal title. Until he procures a deed he can not redeem as owner under section

768, R. S. 1881, but must redeem as a judgment creditor, or lienholder, under section 772, R. S. 1881. *Ib.*

EXHIBITS.

See PLEADING, 4, 6, 14.

EXPERT AND OPINION EVIDENCE.

See EVIDENCE, 3.

FEEES AND SALARIES.

See APPROPRIATION; OFFICE AND OFFICER.

FELLOW SERVANTS.

See MASTER AND SERVANT, 1, 2.

FINAL SETTLEMENT.

See GUARDIAN AND WARD, 1.

FORCIBLE ENTRY AND DETAINER.

Appeal.—When Lies.—Justice of the Peace.—Title to Land.—Jurisdiction.—How Ousted.—An action was instituted before a justice of the peace for the forcible entry and detainer of land. The judgment in the circuit court, to which the case was carried by appeal, was in favor of the plaintiff for fifteen dollars.

Held, that, in such action, the title to the land is not involved, and the appeal from the circuit court, if any right of appeal existed, was to the Appellate and not to the Supreme Court.

Held, also, where jurisdiction of the justice is asserted to be ousted because title is in issue, it must so appear from the record.

Duckworth v. Monier, 458

FORECLOSURE.

See MORTGAGE, 1, 2, 4, 6, 9.

FORMER ACQUITTAL.

See CRIMINAL LAW, 11.

FORMER ADJUDICATION.

1. *Former Action.—Estoppel.—Burden of Proof.*—Where there has been an action between the same parties, and it is claimed that the former action is a bar to the present action, the question as to whether the cause of action set up in the complaint in the second action was or was not compromised and settled is an open question to be tried by the court, in the absence of evidence showing a judgment estopping the plaintiff from prosecuting the second action, with the burden of that issue on the defendant. *Reddick v. Keesling, 128*
2. *Same.—Special Finding.—Party with Burden of Issue.—Failure to Find for.*—*Effect of.*—Where the special finding does not show that the claim in suit was settled and compromised between the parties, it must be assumed that no such settlement and compromise was made. A failure to find for a party having the burden of an issue is equivalent to a finding against him. *Ib.*
3. *Same.—Dismissal of Suit.—Institution of Second Suit.—Return of Consideration Received for Dismissal.—When Unnecessary.*—Where a suit was instituted between the same parties and concerning the same subject-matter, and a sum of money was paid by the defendant to the plaintiff, as a consideration for the dismissal of said suit, but was not received by the plaintiff in compromise and settlement of the matters in issue, it was not necessary for the plaintiff to return the money before instituting a second action. *Ib.*

FRAUD.

See DEED, 9 to 11; PROMISSORY NOTE.

FRAUDULENT CONVEYANCE.

Action to Set Aside.—No Other Property.—Defective Finding.—In a suit by a creditor to set aside a conveyance of property on the ground that it was made to defraud creditors, where the special finding fails to show that the grantor had no property other than the land out of which the debt sued for might have been made, either at the time of the conveyance, or from that time up to the time suit was brought, the defendant is entitled to judgment. *Hartlepp v. Whiteley*, 576

GENERAL CONFERENCE.

See CHURCH, 3.

GERMAN LANGUAGE.

See SCHOOLS, 1 to 3.

GRAND JURY.

1. *Excusing Juror.—Presumption.*—Where, under section 1649, R. S. 1881, authorizing the court to excuse grand jurors from attendance for certain reasons, a grand juror is excused by the court, and the reason for his excuse is not shown by the record, it will be presumed that he was excused upon some of the grounds prescribed by the statute. *Burrell v. State*, 290
2. *Same.—Vacancy.—Selection from By-Standers.*—Where grand jurors are excused the vacancy may be filled by a selection from the by-standers. *Ib.*

GUARDIAN AND WARD.

1. *Accounting by Guardian.—Failure to Make Inventory or File Reports when Due.—Final Settlement.—When will not be set Aside.*—The Supreme Court will not reverse the judgment of the circuit court declining to set aside the final settlement of a guardian on account of irregularities in the execution of the trust, such as failing to make an inventory of the ward's property in the proper form, and to file his reports on the day they were due, and depositing some of the money when received with his own in bank, where it appears that the guardian honestly discharged his duties and accounted for all the money and property due the ward, together with interest, and filed with his final report receipts in full signed by the ward after becoming of age. *La Follette v. Higgins*, 412
2. *Order of Sale of Ward's Realty.—Collateral Attack Upon.*—Where a court, having jurisdiction over the subject-matter and the parties, orders a sale of the wards' land upon a petition filed by their guardian, and approves the same, it can not be collaterally attacked because of certain irregularities in the proceedings whereby the land was sold for less than the amount of the appraisement. *Meikel v. Borders*, 529
3. *Same.—Acquiescence in Sale.*—Persons claiming an adverse title under the ancestor can not, if the wards permit the sale to stand, attack it because of irregularities in the proceedings, as they are not injured thereby. *Ib.*

HUSBAND AND WIFE.

See DEED, 12.

Alienation of Husband's Affections.—Action by Wife.—A married woman may maintain an action against one who wrongfully entices her husband from her and alienates his affections. *Haynes v. Nowlin*, 581

INCEST.

See CRIMINAL LAW, 12, 13.

INCHOATE INTEREST.

See MARRIED WOMAN, 1.

INDIAN LANDS.

Title in Fee Simple.—Taxation.—Certain lands which by the treaty of 1818 between the United States and the Miami nation of Indians were granted or released to the principal chief of the Miami nation in fee simple, in consideration of the cession by the tribe of certain lands to the United States, are not liable for taxation while the owners of the same keep up their tribal relations with the Miami nation. The third article of the ordinance of 1787, relating to the lands and property of Indians, is in force in this State. The language of said clause is broad enough to cover the claims of individual Indians and titles held in fee simple acquired by treaty or otherwise from the United States. *State, ex rel., v. Board, etc.*, 63 Ind. 497, distinguished. *Board, etc., v. Simons*, 193

INDICTMENT.

See CRIMINAL LAW, 1.

INFORMATION.

See CRIMINAL LAW, 2, 6.

INJUNCTION.

See CONTRACT, 1; TAXES, 1.

1. *Prevention of Erection of Building.—When Action will Lie.—Municipal Ordinance.*—Where it is shown that the erection of a building, if permitted, will be in express violation of a valid municipal ordinance, although it would not be a nuisance *per se*, an individual who shows such fact, and shows in addition that its erection will work special and irreparable injury to him and his property, is entitled to relief by injunction. *First Nat'l Bank, etc., v. Sarlla*, 201
2. *Same.—Parties to Action.—Who May be Joined as Plaintiff.*—Although the plaintiffs, in such an action, are shown to be the owners of separate and distinct tenements, and thus are not united in interest with each other, yet there is one object of common interest among all of them. They all claim one general right to be relieved from that which they insist is a nuisance, and which alike affects all of them. Their common danger and interest in the relief sought authorize them to join in the action. *Ib.*
3. *Action Upon Bond.—Invalidity of Bond.—When Injunction Plaintiff Estopped from Asserting.*—When a plaintiff files a complaint and bond, and procures an injunction to issue from a court of general jurisdiction, he is, when sued upon the bond, estopped to say that the court granting the injunction was without jurisdiction of the person of the defendant, and that therefore the bond is invalid, and no suit can be maintained upon it. *Jenkins v. Parkhill*, 25 Ind. 473, distinguished. *Robertson v. Smith*, 422
4. *Same.—Recovery Upon Bond.—Measure of.—Attorney's Fees.*—In a suit upon an injunction bond, where it is shown that the suit in which the bond was filed asked relief other than an injunction, it is proper to allow attorney's fees, and like expenses, in so far as it relates to services rendered in resisting the making of the injunction, or in procuring its dissolution, although other matters may be involved in the litigation. *Ib.*

INSTRUCTIONS TO JURY.

See CRIMINAL LAW, 8, 9; MECHANIC'S LIEN, 3; PRACTICE, 7, 10; RAILROAD, 1; SEDUCTION.

INTERROGATORIES TO JURY.

See JURY; PRACTICE, 7.

JAIL.

See COUNTY.

JUDICIAL DISCRETION.

See CONTINUANCE.

JUDGMENT.

See SUBROGATION, 1.

1. *Action by Administrator.—Res Adjudicata.—Widow's Statutory Allowance.—Election.—Evidence.*—A testator devised certain land to his wife for life, with remainder to his son. The widow died intestate. The son sold the land, and after intermediate conveyances the defendant became the owner. In an action by the administrator of the widow's estate to enforce the collection of the statutory allowance of \$500 against the land which the defendant had purchased, it was adjudged that the widow had elected to take under the will. To this action the defendant was made a party to answer as to his interest, and the plaintiffs were also made parties by reason of being heirs of the testator. Subsequent to this action the plaintiffs sued to recover a portion of one-third of the land, which they claimed to be entitled to as heirs of the widow, alleging that the widow did not elect to take under the will.

Held, that the record in the former action was not admissible in evidence on behalf of the defendant, as the plaintiffs were not estopped by the judgment rendered therein to assert title to the land.

Johnson v. Graves, 124

2. *Defective Summons.—Collateral Attack.*—A judgment upon a complaint against Wesley W. Hilton and ——— Hilton, where summons is served by notice of publication addressed to Wesley W. Hilton and ——— Hilton (whose first name is alleged to be unknown), is not binding upon William W. Hilton and Cora B. Hilton, and may be collaterally attacked.

Schissel v. Dickson, 139

JURISDICTION.

See APPELLATE COURT; CRIMINAL LAW, 7; FORCIBLE ENTRY AND DETAINER.

1. *Appellate Court.—Recovery of Money.—Public Officer.—Validity of Statute.*—Where a recovery of money only is sought, then no matter whether the action is against a public officer or an individual, or whether the action is in contract or tort, the jurisdiction is in the Appellate Court, unless the validity of a statute is involved.
Benson v. Christian, 535
2. *Same.—Retention of for all Purposes*—Where jurisdiction attaches for one purpose, it will be retained for all purposes. When a case which would otherwise go to the Appellate Court, goes to the Supreme Court, because the validity of a statute of the State is involved, the latter court will assume jurisdiction of the entire case. *Ib.*
3. *Circuit Court.—Complaint Need not Show.*—As the circuit court is a

court of general jurisdiction, its authority to proceed in a cause need not affirmatively appear by the complaint. *Board, etc., v. Tichenor, 562*

JURY.

Case Triable by Court.—Refusal to Require Special Verdict.—Submission of Interrogatories.—Instructions to Jury.—In a case where no right of trial by jury exists, error can not be predicated upon the refusal of the court to require the jury to return a special verdict, or in refusing to submit certain interrogatories to the jury, and in giving, and refusing, certain instructions. The statute, in reference to special verdicts, applies to cases triable by jury, and is not applicable to a case triable by the court alone. So the rules and restrictions under which he will submit a question, as well as the instructions as to the manner of answering the same, are in his discretion.

Reddick v. Keesling, 128

LABORERS AND EMPLOYEES.

See CORPORATION, 7.

LACHES.

See DEED, 11.

LARCENY.

See CRIMINAL LAW, 1, 10.

LICENSE.

Executed.—Power of Revocation.—Where A., in pursuance of a parol license, entered upon the lands of B. and put in a tile ditch intersecting a ditch theretofore constructed upon B.'s land, and expended money and labor,

Held, that the license became an executed one, and that B. could not revoke it at will, and obstruct the ditch and take out the tiling.

Saucer v. Keller, 475

LIEN.

See CORPORATION, 7; STREETS, 3.

LIFE-ESTATE.

See WILL, 6.

LIMITATION OF ACTION.

Suit to Enforce Legacy.—Fifteen Years' Statute of Limitations.—A testator bequeathed to his son A. a legacy of two hundred dollars, and devised to his son B. the residue of his estate. The legacy to A. has never been paid. B. took possession of the real estate devised to him upon the death of his father. Testator owed no debts at the time of his death, and left no personal estate. On a judgment recovered against B. the land was sold, and a deed executed to the purchaser. The administrator, more than sixteen years after the will was admitted to probate, sought to enforce the legacy against the purchaser of the land, and petitioned for an order to sell the real estate of his decedent for the payment of debts due from the estate.

Held, that the suit is barred by the fifteen years' statute of limitations.

Witz v. Dale, 120

LIQUIDATED DAMAGES.

See CONTRACT, 2.

LOTS.

See MUNICIPAL CORPORATION, 5, 6.

MANSLAUGHTER.

See CRIMINAL LAW, 14.

MARRIAGE CONTRACT.

1. *Action for Breach.—Answer.—Rescission of Contract.—Must be Specially Plead.*—In an action to recover damages for an alleged breach of a marriage contract, the rescission of the contract is a proper defence to be pleaded to the action. It is error for the court to strike out a paragraph of answer alleging such a defence. The defence has to be specially pleaded, and is not admissible under the general denial.
Mabin v. Webster, 430
2. *Same.—Incurable Disease of Defendant.—Mitigation of Damages.*—In such an action it is competent for the defendant to prove in mitigation of damages that at the time of the breach he was afflicted with an incurable disease, and that marriage would have an injurious effect upon him, and probably shorten his life. *Ib.*

MARRIED WOMAN.

1. *Deed.—Wife not Joining.—Foreclosure Sale.—Inchoate Interest of Wife.—When Becomes Perfect.—Quieting Titles.—Practice.*—A husband and wife joined in the execution of a mortgage on the husband's real estate. The husband afterward conveyed the mortgaged premises by deed, the wife not joining. After the latter conveyance was made the mortgage was foreclosed, the owner of the land and the wife being made parties defendant to the foreclosure proceeding.
Held, that it was proper for the court, upon the suggestion of the wife, without any cross complaint being filed, to direct the sheriff to first offer the undivided two-thirds of the land for sale.
Held, also, that the sale of two-thirds of the land being sufficient to discharge the mortgage indebtedness, the inchoate interest of the wife in an undivided one-third became perfect upon the sale by the sheriff and the execution of a deed pursuant to such sale, and that she might have her title quieted.
Kelley v. Canary, 460
2. *Liability of.—Note and Mortgage.*—A married woman who buys property may execute a note and may, jointly with her husband, execute a mortgage to secure the purchase-money, and it is not material whether she purchases for herself alone or for herself and husband. If she acquires a beneficial ownership in the land purchased she receives a consideration for her contract, and is a principal and not a surety.
Kedy v. Kramer, 478

MASTER AND SERVANT.

1. *Fellow-Servants.*—Whether in a given case one is acting as the representative of the master, or merely as a co-employee with others employed by the same master, depends upon the character of the duties imposed upon him and which he is performing at the time, and not upon his rank or title.
Nall v. Louisville, etc., R. W. Co, 260
2. *Same.—Who are Fellow-Servants.*—Where an employee of a railroad company, intrusted with the duty of saving a bridge whose destruction is threatened by a freshet, in pursuance of the authority conferred upon him, calls out the employees from the various departments of the railroad company's service to unite in saving the bridge, chooses the place where they should work, and directs what appliances they should use, he is not a fellow-servant with those under his control. *Ib.*
3. *Same.—Duty of Master.*—The master's duty to his employees to provide safe places for them to work is a continuing one, and requires him to use ordinary care to keep them safe, and if they become unsafe through his neglect, or are made unsafe through his act, he must answer in damages to a servant who is injured thereby, who is himself free from contributory negligence. *Ib.*

4. *Same.—Assumption of Risk of Employment.*—Where the master orders a servant to do something which involves encountering a risk not contemplated in his employment, although the risk is equally open to the observation of both, it does not necessarily follow that the servant either assumes the increased risk, or is negligent in obeying the order. If the apparent danger is such that a man of ordinary prudence would not take the risk, the servant acts at his peril; but unless the apparent danger is such as to deter a man of ordinary prudence from encountering it, the servant will not be compelled to abandon the service, or assume all additional risk, but may obey the order, using care in proportion to the risk apparently assumed. *Ib.*
5. *Risks Assumed by Employee.—Hazardous Employment.*—A servant assumes all the ordinary and usual risks of the business upon which he enters, so far as these risks are known to him, or could be readily discernible by a person of his age and capacity, in the exercise of ordinary care. This is true even though the duties of the service may be from their nature necessarily hazardous.
Brazil, etc., Co. v. Hoodlet, 327
6. *Same.—Knowledge of Defect.—Continuance in Service.—Master's Promise to Repair.*—An employee who voluntarily continues in the master's service after notice of defects in tools, machinery, or other appliances which augment the danger of his service, thereby assumes the risk as increased by the defect, unless the master expressly or impliedly promises to remedy the defect. *Ib.*
7. *Same.—Character of Risks Assumed by Employee.*—The risks thus impliedly assumed by the employee are the usual risks fairly incident to his service, whether that service is rendered specially hazardous by the use of defective appliances or not. He does not necessarily assume all the risks incident to the business carried on by the employer, but only such as are connected with, and incidental to, his employment. *Ib.*
8. *Same.—Risk not Contemplated in Employment.—Employee Acting under Orders.—To What Extent Protected.*—Where a master orders a servant to do something which involves encountering a risk not contemplated in his employment, although the risk is equally open to the observation of both, it does not necessarily follow that the servant either assumes the increased risk, or is negligent in obeying the order. If the apparent risk is such that a man of ordinary prudence would not take the risk, the servant acts at his peril. But unless the apparent danger is such as to deter a man of ordinary prudence from encountering it, the servant will not be compelled to abandon the service, or assume all additional risk, but may obey the order, using care in proportion to the risk apparently assumed, and if he is injured the master must respond in damages. For risk which plaintiff did not assume by reason of his employment, see opinion. *Ib.*

MASTER COMMISSIONER.

1. *Admission of Improper Evidence.—Report.—Rejection of.*—The entire report of a master commissioner will not be rejected because the commissioner admitted some improper evidence on the hearing of the cause, as the report is only advisory to the court, which may reject the conclusions reached by the master, and from the legitimate evidence in the cause state conclusions of its own. *Lewis v. Godman, 359*
2. *Same.—New Trial.*—The action of the master in admitting illegal evidence can not be assigned as a reason for a new trial. *Ib.*

MEASURE OF DAMAGES.

See CONTRACT, 1.

MECHANIC'S LIEN.

See STATUTE OF FRAUDS, 3.

1. *Dwelling and Appurtenant Buildings.—Joint Lien.*—Where work has been done in the repair of a dwelling-house and out-buildings, which are appurtenant to the dwelling, a joint lien may be taken upon the dwelling with the appurtenant out-buildings. *Crawford v. Anderson, 117*
2. *Notice of Intention to File.*—Mere knowledge on the part of the owner of the property that the material man is furnishing the material is not sufficient. The material man must take such measures as will warn the owner that the initiatory steps are being taken to acquire a lien to the end that he may secure himself against a double payment for his improvements. *Parker v. Dillingham, 542*
3. *Same.—Instructions to Jury.—Evidence.*—Where there was no evidence tending to prove that the material man stood in a situation to acquire a lien, it was not error for the court to instruct the jury that they had nothing to do with the question as to whether the material man, on the faith of the promise of the owner to pay the debt, forebore to acquire a lien until it was too late to do so. *Ib.*

MISAPPROPRIATION OF FUNDS.

See CORPORATION, 3, 4.

MISCONDUCT OF COUNSEL.

See ARGUMENT OF COUNSEL.

MISJOINDER OF PARTIES.

See PLEADING, 11.

MISTAKE.

See VENDOR AND PURCHASER, 4.

MITIGATION OF DAMAGES.

See MARRIAGE CONTRACT, 2.

MORTGAGE.

See SUBROGATION, 1.

1. *Insanity of Mortgagor.—Setting Aside Decree of Foreclosure.*—Where a valid mortgage is executed by a husband, his wife joining, a decree of foreclosure will not be set aside because when it was rendered the husband was insane, at least where the defendant was a purchaser in good faith after a judgment for possession, and where there is no tender of payment. *Laughlin v. Hibben, 5*
2. *Foreclosure.—Inadequacy of Security.—Rents and Profits During Year for Redemption.—Receiver.*—Where lands are sold at a mortgage foreclosure sale, and the mortgage creditor is the purchaser, if he shows that the mortgaged lands are inadequate to secure the debt, that the debtor is insolvent, and that the lands, or a material part of them, are in the actual occupancy of tenants who are to pay rent therefor by a share of such crops as they raise thereon, or otherwise, a court of equity may appoint a receiver to collect the rents and profits accruing from that portion of such lands as are occupied by tenants, and hold them to the expiration of the year allowed for redemption, subject to the order of the court, to be paid to the debtor, if he redeems, or to the mortgage creditor, if the debtor does not redeem. *Merritt v. Gibson, 155*
3. *Same.—Redemption.—Receiver.—Statutes.*—For a consideration of section 767, R. S. 1881, providing for the redemption of lands from judicial sales, and clause seven of section 1222, R. S. 1881, relating

to the appointment of receivers during the time allowed for redemption, see opinion. *Ib.*

4. *Foreclosure.—Decree, who Bound By.—Trustee and Beneficiaries.—Judgment Creditors.—Partition.—Counter-Claim*—At an execution sale the judgment creditors chose of their own members certain ones as trustees. The judgment debtor's land was purchased by those so chosen, as trustees for themselves and the other creditors, and the sheriff's certificate was issued to them as trustees. In a suit to foreclose a mortgage executed by the judgment debtor the trustees were made parties.

Held, that the decree of foreclosure rendered therein, adjudging the mortgage to be a paramount lien, was binding on the trustees and the other creditors as the beneficiaries of the trust.

Held, also, that even if the judgment creditors were not parties to the foreclosure suit through their chosen trustees, the decree was not a nullity, and the mortgagee had a right, in a subsequent suit, to secure a decree barring their equity of redemption. Such right may be set up as a counter-claim in a suit by all the creditors for partition of the land. *Robertson v. Van Cleave, 217*

5. *Priority of Lien.—Pre-Existing Debt.—Knowledge of Earlier Mortgage.—Evidence*—A mortgage was executed to the plaintiff, on the 27th day of June, 1884, to secure a loan then made to the mortgagors, and the mortgage was recorded on the 28th day of January, 1885. The same parties executed a mortgage on the same real estate on the 22d day of November, 1884, to a bank, which latter mortgage was recorded on the 25th day of November, 1884.

Held, that if the mortgage to the bank was executed to secure a pre-existing debt, without any extension of the time of payment, as a consideration for the mortgage, the plaintiff's mortgage would constitute a prior lien on the property.

Held, also, that if the bank, as it was claimed, and as there was some evidence to show, had knowledge of the existence of the plaintiff's mortgage at the time of the execution of its own mortgage, then, notwithstanding the fact that the mortgage to the bank may have been given for value, the plaintiff's mortgage would have priority.

Held, also, that the mortgage to the bank having been excluded when offered in evidence, and this ruling not being brought before the Supreme Court for review, the bank, under the evidence in the case, could not in any event have its mortgage declared a prior lien.

First Nat'l Bank, etc., v. Connecticut, etc., Ins. Co., 241

6. *Foreclosure.—Sheriff's Sale.—Offer of Rents and Profits*—In a foreclosure proceeding, it is not necessary for the sheriff to offer the rents and profits of all the tracts together before offering to sell the fee.

Carpenter v. Russell, 571

7. *Same.—Rule of Property*—The case of *Adler v. Sewell, 29 Ind. 598*, has become a rule of property, and where a sheriff's sale has been made in accordance with the rulings in that case it will not be disturbed.

Ib.

8. *Same.—Sheriff's Deed.—Sufficiency of*—A sheriff's deed giving the names of the mortgagors and owners of the land sold, and such a description of the judgment and decree that there can be no mistake in its identification as the one authorizing the sale of the premises, is sufficient. *Ib.*

9. *Foreclosure.—Redemption by Junior Encumbrancer.—Resale*—A mortgagee who buys in the land himself, at the foreclosure sale, can not, after redemption by a junior encumbrancer, resell the land to enforce payment of an unsatisfied part of his judgment.

Anderson v. Anderson, 573

10. *Same.—Right to Redeem.—Statutes Creating.—Alteration.—Statutes creating a right to redeem may be altered. The right to redeem relates to the remedy, and is not so essentially and intrinsically a contract right as to be entirely beyond legislative control.* *Ib.*

MUNICIPAL CORPORATION.

See INJUNCTION, 1, 2.

1. *Ordinance Relating to Explosive Substances.—Invalidity of.*—A city ordinance placing restrictions upon the keeping and storing of inflammable or explosive oils is invalid which fails to specify the rules and conditions to be observed in such business, and which does not admit of the exercise of the privilege by all citizens alike, who will comply with such rules and conditions; but which does admit of the exercise of an arbitrary discrimination by the municipal authorities, between citizens who will so comply. *City of Richmond v. Dudley, 113*
2. *Police Powers.—Ordinance.—Protecting Against Fire*—Cities in this State possess ample power to enact and enforce reasonable ordinances to secure protection against fire. In the absence of express statutory authority, the enactment and enforcement of reasonable regulations of this character are recognized as a legitimate exercise of the police power necessary to the safety of the city. In addition to the power thus possessed, the statutes of this State confer express authority upon cities to establish fire limits, and prevent the erection of wooden buildings in such parts of the city as the common council may determine. The statutory power thus conferred is not a limitation upon the common law power of the city in this particular.
First Nat'l Bank, etc., v. Sarlis, 201
3. *Same.—Repairs of Building.—Public Safety.—Removal of Building.—Power of Municipality to Compel.—Nuisance.*—If the owner of a building proposes to make repairs or additions to it of such material or in such manner as to clearly menace the public safety or to greatly endanger adjacent property, the city authorities have ample power to interfere and prevent the making of such repairs or addition. They may also remove, or compel the removal of, wooden buildings erected in violation of a valid ordinance; not necessarily because the buildings thus erected are a nuisance, but because their erection was in violation and defiance of the law. *Ib.*
4. *Same.—Deprivation of Power to Make Repairs.—Ordinance.—Invalidity of.*—A municipal ordinance is invalid which arbitrarily attempts to take from the owner of a frame or wooden building all power to make repairs necessary for its preservation, or necessary for its enjoyment, regardless of the effect which such repairs may have upon the public, upon adjacent property, or upon the rights of others; and applies with equal force to buildings detached and remote from all others as to those in immediate proximity to others; and not only to repairs which would tend to create danger, but also to those which would serve to remove or diminish it. *Ib.*
5. *Lots.*—When property is platted into lots and marked in such a way as to impress upon it the character of urban property as distinguished from rural use, the subdivisions are regarded as "lots" within the meaning of the statute authorizing the annexation of territory platted into lots. *Glover v. City of Terre Haute, 593*
6. *Same.—Annexation.—Motive.—Taxes.—Injunction.*—The motive of a city in annexing territory can not be inquired into in an action to enjoin the collection of taxes levied on the property by the city. *Ib.*

NATURAL GAS.

See NEGLIGENCE, 3.

NEGLIGENCE.

See PLEADING, 12.

1. *Needless Exposure to Danger*.—One who needlessly and recklessly exposes himself to open and obvious danger is guilty of negligence. If he thereby suffers injury he is guilty of such negligence as will preclude a recovery against the persons causing such injury.
Brazil, etc., Co. v. Hoodlet, 327
2. *Evidence of Subsequent Repairs*.—Evidence of repairs made after an injury has been sustained is incompetent to show antecedent negligence.
Board, etc., v. Pearson, 456
3. *Natural Gas Company*.—*Escape of Gas from Mains*.—*Duty to Public*.—A natural gas company which has its mains and pipes laid in the streets of a town owes a duty to the citizens and property-owners to use reasonable and ordinary care in so placing its pipes and mains as to prevent the escape of gas therefrom in such quantities as to become dangerous to life and property. *Mississinewa, etc., Co. v. Patton, 472*
4. *Contributory*.—*Crossing Bridge with Traction-Engine*.—In an action by an administrator for the death of his decedent, caused by a defective bridge, a general averment that such decedent was without fault is not overcome by specific averments showing that he attempted to cross the said bridge with a traction steam-engine, with water tank and threshing machine attached.
City of Wabash v. Carver, 553

NEWLY-DISCOVERED EVIDENCE.

See NEW TRIAL, 3, 4, 7, 8.

NEW TRIAL.

See MASTER COMMISSIONER, 2; VERDICT, 3.

1. *Excessive Damages*.—The fourth cause for a new trial, viz., "Excessive damages," is proper only in cases of torts. *White v. McGrew, 83*
2. *As of Right*.—*Partition*.—Where, in an action for partition, the question of title is directly put in issue and adjudicated, the unsuccessful party is entitled to a new trial as of right. *Robertson v. Van Cleave, 217*
3. *Newly-Discovered Evidence*.—*Diligence*.—A party seeking a new trial on the ground of newly-discovered evidence must establish every element of such a case strongly, clearly and satisfactorily. The diligence used to discover the evidence in time to use it on the trial must be fully set forth in the application. It is not sufficient to state generally that he had been diligent in making inquiries of those whom he supposed likely to know anything of the case; all the facts constituting the diligence must be shown. *Morrison v. Carey, 277*
4. *Same*.—*Character of Newly-Discovered Evidence to Warrant the Granting of a New Trial*.—The newly-discovered evidence must be of a very material and decisive character. It must not be cumulative, and should be such as to render it reasonably certain that another trial would bring about a different result. *Ib.*
5. *As of Right*.—*Foreclosure of Mortgage*.—In a suit to foreclose a mortgage, brought by the assignee thereof, where the only question involved is as to the right of such assignee to foreclose the mortgage notwithstanding a release executed by the assignor, the ownership of the land is not in controversy, and the unsuccessful party is not entitled to a new trial as of right. *Rariden v. Rariden, 283*
6. *Same*.—*Special Verdict*.—Such a suit is triable by the court, and it is

not bound by the facts stated in the special verdict, which is merely advisory. *Ib.*

7. *Newly-Discovered Evidence.—Diligence.*—A new trial will not be granted on the ground of newly-discovered evidence where such evidence is merely cumulative, and no diligence is shown to have been used to ascertain and produce it at the trial. *Statecup v. State, 519*
8. *Newly-Discovered Evidence.*—A new trial will not be granted because of newly-discovered evidence which is merely cumulative; nor will a new trial be granted on account of newly-discovered evidence when the sole purpose of such evidence is impeachment; and the fact that the party was surprised by the testimony of the witness proposed to be impeached or contradicted will not change the rule. *Meurer v. State, 587*

NOTICE.

See MECHANIC'S LIEN, 2; VENDOR AND PURCHASER, 1, 3, 5 to 7.

NUISANCE.

See INJUNCTION, 1, 2; MUNICIPAL CORPORATION, 3.

OBLIGATION OF CONTRACT.

See CONSTITUTIONAL LAW, 1; STATE BOARD OF AGRICULTURE.

OFFICE AND OFFICER.

1. *Officers de facto and de jure.—Salary.*—Where a *de facto* officer assumes to retain the office after the qualification of the officer *de jure* and continues to discharge its duties, a payment of salary to such *de facto* officer by a disbursing officer of the State, with full knowledge of the invalidity of the *de facto* officer's title, is no defence to an action for the salary by the officer *de jure*, who has also discharged the duties of the office. *State, ex rel., v. Carr, 44*
2. *Illegal Fees.—Recovery of.*—The Legislature has the constitutional power to provide for the recovery of fees paid to an officer where they are exacted by an illegal taxation made by the officer. *Benson v. Christian, 535*
3. *Same.—Title of Act.—General Subject.—Particular Provision.*—The one subject covered by the title of the act approved February 28th, 1883 (Elliott's Supp., section 1969) is the fees and salaries of public officers, and a particular provision in said act relating to the recovery of fees, illegally taxed, is within the one general subject designated. *Ib.*
4. *Same.—Public Officer.—Commingling of Legal and Illegal Fees.—Right of Recovery.*—Where legal and illegal fees are so commingled by a public officer that no separation can be made, the plaintiff may recover all the fees exacted from him. *Ib.*
5. *Same.—Recovery of Illegal Fees.—Complaint.—Sufficiency of.—Proof.*—In a suit against a public officer for the recovery of illegal fees charged by him, the complaint is sufficient if it shows that some of the charges were made since the act of 1883 went into effect, and that they are greater than the law allows. The plaintiff in such an action need only prove the amount exacted, and nothing more need be done by way of proof to make the illegality appear. The court will take notice of, and apply the law, and if the amount is greater than the law allows, adjudge that the amount demanded and exacted is illegal. *Ib.*

ORDINANCE.

See MUNICIPAL CORPORATION, 1 to 4.

PARTIES.

See INJUNCTION, 2; REAL ESTATE, ACTION TO RECOVER.

PARTITION.

See MORTGAGE, 4; NEW TRIAL, 2; TAXES, 5.

1. *Action for.—Tax Lien Held by Co-Tenant.—Necessity of Tender.*—The owner of an undivided interest in land may maintain an action for partition against his co-tenant in common, notwithstanding the tenant in common holds a valid tax lien upon such undivided interest. The lien in such cases attaches to the part set off to the lien debtor when partition is complete, and in such a case no tender of the amount of the lien is necessary. *Schissel v. Dickson, 159*
2. *Same.—Action for.—Joinder with Action to Quiet Title.—Tax Lien.—Decree.—Practice.*—Plaintiff in a suit for partition against the holder of a tax lien joined in the same suit a cause of action to quiet title to the same land, but made no tender of the amount necessary to discharge the tax lien, as required in an action to quiet title against the holder of a tax lien. The court found that the plaintiff was the owner in fee of the undivided two-thirds of the land, and tenant in common with the defendant, who was the owner in fee of the remaining one-third, but that plaintiff's interest was subject to a valid tax lien in favor of the defendant. The court awarded plaintiff partition, but did not quiet plaintiff's title, holding that the lien attached to the severed interest, and providing by the decree for its satisfaction from the partition sale ordered.

Held, proper proceeding.

Ib.

PENALTY AND INTEREST.

See TAXES, 3, 4.

PERSONAL PROPERTY.

See WILL, 3.

PLEADING.

See ARBITRATION AND AWARD, 3, 4; CORPORATION, 3; JURISDICTION, 3; MARRIAGE CONTRACT, 1; PRACTICE, 4, 6.

1. *Overruling Motion to Strike Out.—Not Reversible Error.*—Overruling a motion to strike out a pleading or a part of a pleading is not error for which a cause will be reversed. *Crawford v. Anderson, 117*
2. *Variance.—When Material.*—No variance between the allegations in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defence upon the merits. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must be shown in what respect he has been misled. See section 391, R. S. 1881. *Reddick v. Keating, 128*
3. *Sufficiency of Answer.—Reply.*—The Supreme Court will not look beyond the allegations of an answer, to the reply, for the purpose of determining its sufficiency. *Dukes v. Cole, 137*
4. *Same.—Exhibits.—When Part of Pleading.*—Exhibits are to be considered as a part of a pleading only in cases where they are copies of the instrument upon which the pleading is founded. *Ib.*
5. *General Allegations.—When Specific Allegations Control.*—General allegations in a pleading are controlled by specific allegations, but in order to control the general allegations they must be clearly repugnant thereto, and must show that the general allegations are untrue. *Warbritton v. Demorett, 346*
6. *Deed.—Exhibit.*—Deeds or other instruments forming evidence of title are not the foundation of pleadings asserting title, and if made exhibits they will be disregarded. *Smith v. Schweigerer, 363*

7. *Supplemental Complaint.—Demurrer.*—A motion to strike out a supplemental complaint may properly be overruled.
Wayne Pike Co. v. Hammons, 368
8. *Same.—Demurrer.*—Sustaining a demurrer defective in form to a pleading which is wholly insufficient is not available error. *Ib.*
9. *Complaint.—Motion to Reject.*—Where a complaint is sufficient to withstand a demurrer it is not error to overrule a motion to reject parts of the complaint.
Mabin v. Webster, 430
10. *Same.—Motion to Strike Out.—When Properly Overruled.*—A motion to strike out a paragraph of pleading admits the truth of all the facts well pleaded for the purpose of the motion, and it should not be sustained if the facts stated in the paragraph are relevant or pertinent to the question to which they are addressed, though not sufficient to withstand a demurrer. *Ib.*
11. *Misjoinder of Parties.—Demurrer.*—In an action by a wife for damages for the destruction of her property caused by the negligence of the defendant, where the name of the husband appears in the caption of the complaint as plaintiff, but is not mentioned in the body of the complaint, and no attempt is made to state a joint cause of action, the name of the husband in the caption will be regarded as surplusage, and the complaint is not bad on demurrer for failure to present a good cause of action in favor of both plaintiffs.
Mississinewa, etc., Co. v. Patton, 472
12. *Same.—Negligence.*—A complaint which charges negligence in general terms is good on demurrer. *Ib.*
13. *Complaint.—Sufficiency of After Verdict.*—If a complaint is sufficient to bar another action for the same cause, it is good after verdict where its sufficiency is questioned by a motion in arrest of judgment, or by an assignment of error in the Supreme Court, if the defects are such as may be supplied by proof.
Robinson v. Powers, 480
14. *Complaint.—Exhibits.*—It is only proper to make an instrument an exhibit when it is the foundation of an action. Any other exhibit will be disregarded.
Barnes v. Mowry, 568

POLICE POWER.

See MUNICIPAL CORPORATION, 1 to 4.

PRACTICE.

See AMICUS CURIAE; BILL OF EXCEPTIONS; MARRIED WOMAN, 1; PARTITION, 2; PLEADING; SUPREME COURT.

1. *Circuit Court.—Presumption in Favor of Rulings.*—The circuit court is entitled to every reasonable presumption in favor of the regularity of its proceedings. In this court it must affirmatively appear that the court below erred to justify reversing its judgment.
Crawford v. Anderson, 117
2. *Same.—Evidence.—Failure to Object to.*—Alleged error in the admission of evidence will not be considered on appeal where the record fails to show that any objection was made or exception taken in the trial court. *Ib.*
3. *Assignment of Error.—Failure to Make Specific Objection.*—Where it is assigned as error that the court erred in rendering judgment upon a demurrer, but no specific objection was made thereto, and no exception was taken, the judgment will not be disturbed. *Dukes v. Cole, 137*
4. *Pleading.—Reply.—Demurrer.—General Denial.—Subsequent Withdrawal of.*—A reply which sets up only such facts as are admissible under the general denial already in is demurrable, and the subsequent withdrawal of the general denial will not render the ruling sustaining the demurrer available error.
Baltes v. Bass Foundry, etc., 185

5. *Supreme Court.—Parties to Appeal.—Motion to Dismiss Appeal.—Waiver.*
—Where a cause, pending in the Supreme Court, has been submitted by agreement of parties, all question as to the parties to the appeal is waived, and a motion filed thereafter to dismiss the appeal for want of notice to some of the parties to the judgment must be overruled. *Higbee v. Rodeman, 244*
6. *Refusal to Strike Out Pleading.—Not Available Error.*—No available error can be predicated on the ruling of the circuit court in refusing to strike out part of a pleading. *Lewis v. Godman, 359*
7. *Equity.—Submission to Jury of Questions of Fact.—Objection to Manner of Submission.—Interrogatories and Instructions.*—Where, in a suit in equity, the court submits questions of fact to the jury, it is not bound by their verdict, which is merely advisory, and may disregard their findings. The parties can not complain of the manner in which the questions of fact are submitted to the jury, or object to the form of the interrogatories or instructions. *Koons v. Blanton, 383*
8. *Venire de Novo.—Motion for.—When Sustained.*—A motion for a *venire de novo*, in case of a special finding of facts, can be sustained only when such finding is defective in form. *La Follette v. Higgins, 418*
9. *Alleged Admission of Incompetent Evidence.—Prejudicial Error Must be Shown.*—Where the evidence is not in the record, the judgment will not be reversed on account of the admission of alleged incompetent evidence, unless it is affirmatively made to appear that its admission was error, and that the appellant was harmed thereby. *Morningside v. Musser, 470*
10. *Instructions to Jury.—Making Part of Record.—Bill of Exceptions.*—Instructions which are not brought into the record by a bill of exceptions, or which are not signed by the judge and filed as a part of the record, can not be considered on appeal. *Van Sickle v. Belknap, 558*
11. *Appeal to Supreme Court.—Sufficiency of Complaint, How Tested.*—Where the sufficiency of a complaint is questioned for the first time by an assignment of error in the Supreme Court, such assignment must be predicated upon the complaint as an entirety, and not upon the separate paragraphs thereof. *Board, etc., v. Tichenor, 562*

PREScription.

See EASEMENT.

PRINCIPAL AND SURETY.

1. *Creditor's Inaction.—When Surety not Released.*—A creditor does not lose his right to hold the surety by inaction or passiveness except in cases where the surety has taken such steps as compel the creditor to proceed or lose his claim. *Barnes v. Mowry, 568*
2. *Same.—Release of Surety.—Notice to Creditor to Proceed.*—A surety is not released by the failure of the creditor to proceed against the principal until the surety has complied with the statutory provision by notifying the creditor to proceed against the principal. The surety can only obtain his release by following the provisions of the statute in his behalf. *Ib.*
3. *Same.—Institution of Suit.—Notice.*—A suit, no matter what its character, can not operate as a notice so as to release a surety. *Ib.*

PRIORITY OF LIEN.

See MORTGAGE, 5.

PRISONERS.

See COUNTY.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

See APPELLATE COURT, 1.

PROMISSORY NOTE.

Action on.—Bona-Fide Holder.—Fraud.—Burden of Proof.—In order to cast the burden upon the holder of a note, payable in bank, to prove that it became the owner of the same in good faith before maturity, and for a valuable consideration, the evidence must show that the note was procured by fraud; it is not sufficient to show that it was procured without consideration. *Galvin v. Meridian Nat'l Bank, etc.*, 439

QUIETING TITLE.

See TRUST AND TRUSTEE, 5.

Statute of Limitations.—An action to quiet title is barred in fifteen years. *Stonehill v. Swartz*, 310

QUITCLAIM.

See VENDOR AND PURCHASER, 9.

RAILROAD.

See EVIDENCE, 1.

1. *Action for Personal Injuries.—Speed of Trains.—Instructions to Jury.*—In an action against a railroad company for damages for personal injuries, it is not error to refuse to instruct the jury broadly that "A railroad company has a right to propel its trains over its road at a reasonable rate of speed, and when its track is in a good and safe condition, and the cars properly equipped and in safe condition, except as to latent defects, which by the highest degree of skill and care could not be discovered, it would not be negligence *per se* to run the train at a rate of speed of forty miles an hour."

Pennsylvania Co. v. Newmeyer, 401

2. *Same.—Passenger on Freight Train.—Increased Risk.—Obligation of Railroad Company.*—Whoever takes passage upon a freight train assumes the increased risk incident to the operation and management of such a train. When a railroad company does, however, accept passengers on its freight trains, it becomes bound by all the obligations of a common carrier of passengers upon a regular passenger train. *Ib.*

REAL ESTATE, ACTION TO RECOVER.

1. *Counter-Claim to Quiet Title.—Parties Defendant Thereto.*—In a suit to recover the possession of real estate, where a counter-claim is filed by the defendants to quiet the title to the land in dispute, it is not necessary that the grantors of the defendants should be made parties defendant thereto. *Warbritton v. Demorett*, 346
2. *Same.—Conveyance of Bordering on Highway.—What Passes.*—The conveyance of land bordering on a public highway, as a general rule, conveys title to the center of the highway whether so expressed in the deed or not. *Ib.*

RECEIVER.

See CORPORATION, 3, 5, 6.

RECORDING.

See CHATTEL MORTGAGE.

REDEMPTION.

See EXECUTION, 2 to 4; MORTGAGE, 3, 9, 10; TAXES, 3.

REDEMPTION LAWS.

See CONSTITUTIONAL LAW, 1.

REFORMATION OF INSTRUMENT.

See DEED, 9, 11, 12.

RELEASE OF SURETY.

See PRINCIPAL AND SURETY.

REMAINDERS.

See WILL, 4 to 6.

RENTS AND PROFITS.

See MORTGAGE, 2; TENANTS IN COMMON.

RES ADJUDICATA.

See FORMER ADJUDICATION; JUDGMENT, 1.

RESCISSION.

See MARRIAGE CONTRACT, 1.

RESTRAINT OF TRADE.

See CONTRACT, 2.

REVOCATION.

See LICENSE.

RIGHTS AND REMEDIES.

Where a statute creates a right, and provides generally for its enforcement, but neither creates nor designates a remedy, the implication is that the Legislature intended that the right should be enforced by some existing and appropriate remedy. *Van Sickie v. Belknap*, 558

SALE.

See GUARDIAN AND WARD, 2, 3.

1. *Executory Contract.—Personal Property.—Delivery.—Vesting of Title.*—A. purchased a tract of land for the purpose of cutting and utilizing the timber in the manufacture of staves. An unpaid balance of the purchase-price was secured by a mortgage on the land. A. afterwards entered into a contract with the appellees, whereby he agreed to deliver to them a large number of staves, of his first manufacture of merchantable sawed staves. The contract further provided that the title and ownership of all the timber and staves bought by A. should vest in the appellees until the contract was complied with. The appellees were to furnish A. a sufficient amount of money from time to time to pay for making and hauling the staves. The appellees after receiving within a small number of the entire quantity of staves mentioned in the contract, seized a large number of staves which had been delivered by A. to the mortgagee of the land on account of the mortgage indebtedness, to reimburse them for advances made to A.

Held, that the title to the staves in controversy did not pass to the appellees under the terms of the contract.

Held, also, that something was necessary to designate or indicate the staves before it could be said that any given staves or lot of staves passed under the contract. *Fordice v. Gibson*, 7

2. *Same.—Article to be Manufactured.—When Title Passes.*—A contract for the sale of an article to be manufactured is an executory contract, and ordinarily no title passes until the thing is completely done and notice given to the vendee, or some act done by the vendor designating it as the thing sold, either by setting it apart, marking it, or some other similar act. *Ib.*

SCHOOL-HOUSE, LOCATION OF.

See SCHOOLS, 4, 5.

SCHOOLS.

1. *Study of German.—Statute Construed.*—In the act of May 5, 1869, section 4497, R. S. 1881, which provides that "whenever the parents or guardians of twenty five or more children in attendance at any school of a township, town, or city, shall so demand, it shall be the duty of the school trustee, or trustees, of said township, town, or city, to procure efficient teachers, and introduce the German language as a branch of study into such schools," the words "any school" mean any place where a public school is taught, with its complement of teachers and scholars.
Board of School Comm'rs, etc., v. State, ex rel., 14
2. *Same.—Where German Must be Taught When Demand is Made.*—Where, under such statute, the requisite demand is made on the board of school commissioners for the teaching of German in a certain school of a city, the requirement of the statute is not met by providing that the language shall be taught in another school of the city when the pupils have reached a certain grade, but it must be taught in the particular school where the demand is made. *Ib.*
3. *Same.—Refusal to Introduce German Because of Lack of Funds.—Insufficiency of Excuse.*—The board of school commissioners can not set up a lack of funds as an excuse for their refusal to introduce the study of German, where it appears that studies not named in the statute as required studies are taught at an expense greater than would be necessary for the teaching of German. *Ib.*
4. *Location of School-House by Trustee.—Appeal to County Superintendent.*—By section 4537, R. S. 1881, an appeal lies in the matter of locating a township school-house from the decision of the township trustee to the county superintendent, and the decision of the superintendent is final.
Knight v. Woods, 101
5. *Same.—Decision of Superintendent.*—The decision of the superintendent is binding on the trustee from the time it is given, though not entered in the superintendent's record until afterwards. *Ib.*

SEDUCTION.

1. *Instructions to Jury.—Definition of Seduction.*—In an action for damages for seduction, it is not error for the court to instruct the jury that "the term seduction is defined in the law books in the words," etc., instead of stating an independent definition covered by the judge himself, the correctness of the definition not being questioned.
Robinson v. Powers, 480
2. *Same.—Instructions to Jury.—Chastity of Plaintiff.—Presumption as to.*—It is not necessary in an action for damages for seduction to instruct the jury that before the plaintiff can recover she must prove that at the time of the commission of the injury she was of chaste character, the court having instructed the jury that to entitle the plaintiff to recover she must have yielded to the illicit intercourse by reason of the promises and influence made and brought to bear upon her by the man. The presumption of law is in favor of the woman's chastity, and in the absence of any evidence to the contrary, the law will presume that she was chaste. *Ib.*
3. *Same.—Instructions to Jury.—Unchastity of Plaintiff.*—In the absence of evidence tending to show that the plaintiff was an unchaste woman, or a woman of no virtue, it is proper for the court to refuse to instruct the jury that "An unchaste woman, or one who is not virtuous, can not be seduced." *Ib.*

SELF-DEFENCE.

See CRIMINAL LAW, 14.

SHERIFF'S DEED.

See MORTGAGE, 8.

SHERIFF'S SALE.

See EXECUTION, 1; MORTGAGE, 6, 7.

SOLDIERS' MONUMENT.

Statute Construed.—Incidental Expenses.—From What Fund Paid.—Appropriation.—Under the act of March 3d, 1887, providing for the erection of a State Soldiers' and Sailors' Monument, etc., no part of the sum of \$200,000 appropriated for the erection of the monument can properly be expended in the payment of merely incidental expenses. There is a sufficient appropriation in said act to make it the duty of the auditor of State to draw warrants for the payment of such incidental expenses out of the "General Fund" in the State treasury. The act provides for the incurring of said incidentals, and directs that the same shall be paid. This is sufficient. The use of technical words in a statute making an appropriation is not necessary.

Henderson v. Board, etc., 92

SPECIAL FINDING.

See FORMER ADJUDICATION, 2; FRAUDULENT CONVEYANCE.

1. *Silence Upon a Material Fact.*—When a finding is silent upon a fact material to be found, it is to be taken as found against the party having the burden of proving such fact.

Parke County, etc., Co. v. Terre Haute, etc., Co., 73

2. *Intermediate Errors.*—When Judgment not Reversed for.—Where the merits of a controversy are to be determined by the special finding of facts in the cause, the judgment of the court below will not be reversed on account of intermediate errors.

Reddick v. Keeshing, 188

3. *Power of Court to Amend.*—The court has no power to amend or alter its special finding after the same has been announced and filed.

La Follette v. Higgins, 412

4. *Amendment of After Verdict.*—After the rendition of judgment the court can not amend and supply defects in a special finding on motion of one of the parties.

Hartlepp v. Whiteley, 576

SPECIAL JUDGE.

Appointment of.—Statute.—Section 4 of the act of March 1st, 1855 (2 Davis Stat. 10), relative to the appointment of special judges, is still in force, except in so far as it is in conflict with the act of March 7th, 1877 (Acts 1877, p. 28), and the appointment of a judge *pro tem.* by the regular judge, who is unable to preside at a term of court on account of illness, is valid.

Burrell v. State, 290

SPECIAL VERDICT.

See JURY; NEW TRIAL, 6; VERDICT, 2.

STATE BOARD OF AGRICULTURE.

Private Corporation.—Constitutional Law.—Impairing Obligation of Contract.—The Indiana State Board of Agriculture, organized under the act of February 14th, 1851, entitled "An act for the encouragement of agriculture," is a private corporation, and hence the act of March 4th, 1891, abolishing the said State board of agriculture, transferring all its assets, liabilities and credits to a State agriculture board, and providing for the creation of the State Agricultural and Industrial

Board, is unconstitutional, as impairing the obligation of contract, and seeking to take the property of the State Board of Agriculture without due process of law. *Downing v. Indiana State Board, etc.*, 443

STATE SUPERVISOR OF OIL INSPECTION.

See CONSTITUTIONAL LAW, 2, 5.

STATUTE.

See AGREED CASE, 1; APPEAL, 3; CONSTITUTIONAL LAW, 2; CORPORATION, 2, 7; COUNTY COMMISSIONERS, 1, 2; CRIMINAL LAW, 1, 4, 5, 13; DRAINAGE; EXECUTION, 3, 4; GRAND JURY, 1; JURISDICTION, 1; MORTGAGE, 3; OFFICE AND OFFICER, 3, 5; PLEADING, 2; SCHOOLS, 4; SPECIAL JUDGE; STATE BOARD OF AGRICULTURE; STREETS, 3; VENDOR AND PURCHASER, 8.

STATUTE CONSTRUED.

See APPEAL, 2; BRIDGE; COUNTY COMMISSIONERS, 6; SCHOOLS, 1; SOLDIERS' MONUMENT; STREETS, 1, 2; TAXES, 3, 4.

STATUTE OF FRAUDS.

1. *Building Contracts*.—A verbal agreement by the owner of the property to pay the debt of the contractor to the material man, in a case where the owner owes the contractor nothing, is within the statute of frauds, and void, even where by reason of such verbal promise the material man furnished materials to complete the improvements, and forebore to file his lien within the allotted time.
Parker v. Dillingham, 542
2. *Same.—Debt of Another*.—If, however, the owner was indebted to the contractor, his agreement to pay for the materials would in such case be an agreement to pay his own debt to a third person, and not within the statute. *Id.*
3. *Same.—Waiver of Mechanic's Lien*.—Mere forbearance to file a mechanic's lien is no consideration, but if an express agreement is made to waive the right of lien, such waiver constitutes a consideration which will render the owner's promise binding. *Id.*

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTION; QUIETING TITLE; TRUST AND TRUSTEE, 4.

STREETS.

1. *Opening of.—Appeal to Circuit Court.—Transcript Constitutes Complaint.—Objection.—How Stated.—Recitals in Transcript.—Inconclusiveness of*.—In proceedings to open a street under section 3180, R. S. 1881, upon appeal to the circuit court the transcript constitutes the complaint, and the appellant must state specifically in writing the grounds of his objection to the proceedings of the common council and city commissioners, and no other question can be tried or heard, and "issues of law and of fact may be found, tried and determined as in other actions at law." Upon such an appeal, an issue of fact may be raised by an objection that the resolution to refer the matter of opening the street to the commissioners was not adopted by a two thirds vote of the common council, as required by law. The recitals in the transcript to the contrary are not conclusive.
City of Logansport v. Shirk, 352
2. *Same.—City Commissioners.—Referring Back Report to.—What Reference is for.—Assessment of Additional Property.—Invalidity of*.—Under sections 3174 and 3189, R. S. 1881, which provide for the referring back of reports to the city commissioners, the reference is for the purpose of readjusting or changing the assessment, or amending or changing the report by the commissioners as to the persons, or property of the

persons, previously notified of the proceedings, and it does not contemplate any action on the part of the commissioners which will affect other persons and property. An assessment of additional property by the commissioners upon such a reference is without any authority of law and void. The statute would be void if it had contemplated the assessment of the lands of other persons upon such a reference, for it makes no provision for the giving of notice to them. It is a statute which provides for the taking of private property for public use, and must be strictly construed. *Ib.*

3. *Street Improvement.—Lien for.—Enforcement of.—Pleading.*—In a suit by a contractor under the act of April 13th, 1885, to enforce a lien for street improvement on the abutting lots, he must plead all the acts done by the municipal officers, and all facts essential to show their authority, but he is not bound to incorporate in his complaint, by reference or otherwise, any written instrument except the estimate or assessment. *Van Sickle v. Belknap, 558*

SUBROGATION.

1. *Void Mortgage.—Judgment.—Payment of by Mortgagees.*—A husband and wife, who were under guardianship, falsely represented that the guardianship had been terminated, and that they had been adjudged of sound mind, and they induced a firm of attorneys to accept a mortgage on the undivided interest of the wife in certain real estate, to secure the compensation agreed upon for legal services to be rendered. Prior to the date of the guardianship a judgment had been rendered against the wife, which was a lien upon her interest in the real estate mortgaged as aforesaid.

Held, that the mortgage was void by reason of the legal incapacity of the mortgagors to execute the same.

Held, also, that the attorneys, having paid off the judgment rendered against the wife to protect what they erroneously supposed was a valid mortgage, were entitled to be subrogated to the lien of said judgment, with priority over a judgment rendered in favor of the guardian for services, etc. *Spaulding v. Harvey, 106*

2. *Same.—Right of.—Upon what Depends.*—The right of a creditor to be subrogated to the securities of one whose claim he has paid, does not depend upon the solvency or insolvency of the debtor, but upon the circumstances attending the payment of the debt, to which the security was an incident. *Ib.*
3. *Same.*—The right of subrogation does not depend upon or grow out of the ability of the parties to make valid contracts, as it is not founded upon contract, either express or implied, but upon principles of equity and justice, intended to afford protection to a meritorious creditor, and prevent the sweeping away of the fund, from which, in good conscience, he ought to be paid. *Ib.*

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1. *Conflicting Evidence.—Reversal of Judgment.*—Where the evidence is conflicting, if there is some evidence tending to sustain the verdict, the judgment will not be reversed by the Supreme Court. *Crawford v. Anderson, 117*

2. *Finding of Facts.—Weight of Evidence.*—Where there is sufficient evi-

dence to support the finding of facts the Supreme Court will not weigh the evidence on appeal. *La Follette v. Higgins*, 412

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1. *Collection of.—Injunction.—Tender.*—Where property is subject to taxation, the collection of the tax can not be enjoined without paying or tendering the amount for which the property is liable, although part of the amount levied may be illegal. *Hyland v. Central, etc., Co.*, 68
2. *Same.—Corporation.—Assessment upon Capital Stock.*—Where the tangible property of a corporation is of less value than the capital stock, the capital stock is taxable to the extent that it exceeds in value the tangible property. *Hyland v. Brazil, etc., Co.*, 128 Ind. 335, distinguished. *Ib.*
3. *Tax Sale.—Redemption.—Persons Under Disability.—Penalty and Interest.—Statute.*—Under section 208 of the general tax law of 1872 (1 Davis Stat. 121), all persons might redeem within two years after the sale on the payment of fifty per cent. penalty and six per cent. interest. Under the tax law of 1872, where the delinquent was an infant, when the tax sale was made, he was properly chargeable with fifty per cent. penalty and six per cent. interest from the date of each payment. By section 210 of the statute, extending the time for redemption to two years after the disability was removed, it is intended that persons under disability may, within that time, redeem on the same terms as other persons were allowed to redeem before the expiration of the two years. *Schissel v. Dickson*, 139
4. *Same.—Payment of City Taxes to Protect Lien.—Penalty and Interest.*—By section 251 of the general tax law of 1872 (1 Davis Stat. 127) the holder of a lien on lands was authorized to pay taxes on such lands, and by the act of March 11th, 1875 (1 Davis Stat., p. 338), this provision also became applicable to city taxes. The purchaser at a sale for State and county taxes, who pays city taxes to protect his lien, is entitled to the same penalty and interest on them as on the State and county taxes. *Ib.*
5. *Same.—Proper Parties.—Property not Divisible.—Sale.*—In a suit for partition of land in this State, all persons holding liens or claims upon it are proper parties, and the court has power to hear and adjust all the equities between them; and when the property is not divisible, to order a sale and distribution of the proceeds according to the rights of the several parties, and a party holding either a legal or an equitable title may institute the proceedings. *Ib.*
6. *Platted Land.—Taxation of.—Authority of County Auditor Concerning.*—Where land is platted, and the plat submitted to the county auditor, as required by law, to assess and apportion the true valuation of each lot or parcel of land described in such plat, the auditor has the right, upon the presentation of the plat to him, to make an original assessment upon the lots as platted, and apportion it on the lots. His authority is not confined simply to apportioning the amount at which the land had been previously assessed as unimproved land, upon the lots as platted. See section 6392, R. S. 1881.

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2. *Enforcement of.—Volunteer.—Parol Evidence Inadmissible to Establish Express Trust.*—In an action to enforce a trust in land, the plaintiff, who has parted with nothing, can not show by parol that a grantor conveying land by a deed absolute had an oral agreement with the grantee that the latter should have a life-estate in the land, and hold the remainder in trust for said plaintiff. *Stonehill v. Swartz, 310*
3. *Same.—Parol Evidence.*—An express trust can not be established by parol evidence. *Id.*
4. *Same.—Action to Enforce.—Statute of Limitations.*—Where a trustee, ignoring an alleged trust, sells and mortgages the trust lands as his own, and disposes of the same by will, without remonstrance from the *cestui que trust*, the latter can not, after more than twenty years have elapsed, bring an action to enforce a trust in such lands. *Id.*
5. *Resulting Trust.—Evidence Establishing.—Quieting Title.*—When a resulting trust in land is claimed, and the evidence, while it does not show an express contract between the parties, does show that the relation of principal and agent existed between them, and that the land was purchased by the agent in the absence of the principal, and with her money, it is sufficient to create a resulting trust under the provisions of section 2976, R. S. 1881, and upon the death of the agent, the trust being terminated thereby, the principal is entitled to have her title to the land quieted. *Mull v. Bowles, 343*

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cumbent upon him to make due inquiry, he is bound by all the knowledge which a reasonable inquiry would have imparted.

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2. *Same.—Bona Fide Purchaser.—Who is not.*—One who purchases with full knowledge of prior equitable or legal rights is not a purchaser in good faith. *Ib.*
3. *Same.—Notice Before Payment of Purchase-Money.*—Notice before payment of the purchase-money prevents the acquisition of the character of a *bona fide* purchaser. *Ib.*
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5. *Bona Fide Purchaser.—Notice.*—Notice, either actual or constructive, before the payment of the purchase-money, prevents the acquisition of the character of a *bona fide* purchaser. *Hawes v. Chaille, 435*
6. *Same.—Constructive Notice.*—One who has notice of such facts as would put a reasonably prudent man upon inquiry is charged with the knowledge that an inquiry, reasonably prosecuted, would impart. *Ib.*
7. *Same.—Vendor's Lien.—Bona Fide Purchaser.*—An administrator's deed contained nothing showing that the purchase-money was not fully paid. The proceedings prior to the order of sale showed merely that for part of the purchase-money notes were executed. The order of sale required the administrator to take freehold sureties, and his report of the sale indicated that he did take such sureties, though he did not in fact do so. The defendants purchased the land from the grantees of the administrator after the purchase-money notes became due. The administrator brought an action to enforce a vendor's lien on the land in their hands.
Held, that the defendants were not chargeable with notice of such a lien, and that it could not be enforced. *Ib.*
8. *Failure to Record Deed.—Bona Fide Purchaser.*—Where a deed is not recorded within the time provided by sections 2926 and 2931, R. S. 1881, a subsequent purchaser for value and in good faith from the original grantor or his heirs acquires the better title.
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2. *Special.—What it Should Contain.—Failure to Find upon Material Fact.—Effect of.*—A special verdict should contain a finding by the jury upon every material fact in issue necessary to constitute the plaintiff's cause of action or the defendant's defence upon which there is evidence. There need be no finding upon immaterial facts, nor upon facts presumed but not within the issues. A failure to find upon any material fact in issue is equivalent to a finding against the party upon whom the burden rests to establish such fact.
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3. *Same.—Failure to Find upon Material Fact.—Remedy for.—Motion for New Trial.*—If the special verdict fails to find material facts, within

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See DECEDENTS' ESTATES.

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Held, that the children of the testator took a vested interest in the residue of his estate at the time of the death of the testator, the enjoyment of the same to be postponed during the life-estate of the wife.
Heilman v. Heilman, 59
2. *Same.—Vesting of Estates.*—The law favors the vesting of estates and will construe the terms of a will as creating a vested estate, if possible. *Ib.*
3. *Same.—Realty and Personality.*—Where the same clause of a will operates on both real and personal property, if the bequest of real estate vests, the same construction will be applied to the personal estate. *Ib.*
4. *Same.—Vested and Contingent Remainders.*—Where a life-estate is given to the widow by will, the fact that the will gives to the widow the unrestricted use of the personal property during life, and, with others, a power of disposition of the real estate, thus making it uncertain what property will remain to distribute at her death to the remainderman, does not render the remainder contingent. *Ib.*
5. *Same.*—Where there is no other gift contained in the will than the direction to pay, distribute or divide the estate in the future, yet, if such payment, distribution or division appear to be postponed for the convenience of the estate, fund or property, which embraces a life-estate to another, the estate will be vested and not contingent. *Ib.*
6. *Construction.—Life-Estate.—Power of Disposition.—Vested Remainder.*—The will of the testator, after mentioning the disposition of certain property during his lifetime, devised to his wife all of his other property, to be held and used by her during her natural life. The will also provided, as to certain notes, that she was to collect the same, with the privilege to use so much thereof as she might deem necessary to carry on her business, etc. The will further provided: "But before her (the wife's) death, I desire her to provide by will, or otherwise, for a distribution of whatever of my estate may remain in her hands among her and my children in such manner as she in

her judgment shall deem best and most equitable. Such distribution not to take effect until after her death."

Held, that when a will limits the estate of the first taker to life, the devisee can not take a fee, although he may be invested with a power to appoint those who shall take that estate.

Held, also, that under the will as to the personal property a right was vested in the widow to use such of it as she chose, and to distribute what remained at her death, at her pleasure, among the members of the class designated by the testator.

Held, also, that as to the real estate the fee was not in the widow at any time, and she could not devise the same, and that the remainder was vested in the heirs at the date of the testator's death.

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8. *Same.—The Word "Estate" In.—How Construed.*—The word "estate" in a will may, if it is necessary to do so in order to carry out the intention of the testator, be construed to mean one species of property only. It does not always mean both real and personal property. *Ib.*

9. *Construction.—Nature of Estate.*—Where real estate is devised to one, coupled with a devise over, in case of his death without issue, and the primary devisee survives the testator, he takes an absolute fee, the words referring to a death meaning a death in the lifetime of the testator. *Wright v. Charley*, 257

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